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Racial Imagery in Criminal Cases

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RACIAL IMAGERY IN CRIMINAL CASES

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> During their testimony, Officer Powell and another defendant, Sgt. Stacey C. Koon, consistently described Mr. King in non-human terms. If it was part of a strategy to diminish Mr. King in the jurors' minds, it may have backfired.[1]
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> "It was Mr King, a black man who was stopped for speeding, who chose to evade the police and to comply only slowly with their commands."[2]
>
> "[H]e [King] deserved what he got."[3]

There are no "race shield laws." Nor are there other measures that adequately curb the use of racial[4] imagery in criminal cases. Moreover, in contrast to the political and scholarly climate that preceded the adoption of rape shield laws, there is no storm of protest on this front.[5]

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1. *Reporter's Notebook: Baton is 'Star' in Police-Beating Trial*, N.Y. TIMES, Apr. 6, 1992, at A14 [hereinafter *Notebook*]. This optimistic analysis was written before the defendants' acquittals.

2. Seth Mydans, *Defense Lawyer at Beating Trial Asserts Driver Prompted Violence*, N.Y. TIMES, Apr. 22, 1992, at A16 (quoting closing argument by Officer Powell's attorney).

3. Joseph Kelner & Robert S. Kelner, *The Rodney King Verdict and Voir Dire*, N.Y. L.J., May 26, 1992, at 3 (quoting juror in post-trial interview). Officers Powell, Koon, Briseno, and Wind were acquitted in the 1992 state court trial for the assault on Rodney King. In 1993, Officers Powell and Koon were convicted in federal court for violating King's civil rights. *See 2 Officers Guilty, 2 Acquitted*, L.A. TIMES, Apr. 18, 1993, at A1. This Article was written prior to the federal trial and all references to the Rodney King beating case concern the state court trial.

4. I use the adjective "racial" rather than "racist" throughout this Article. Most of the remarks and images to which I refer I consider racist, but I think debate on that point is distracting. Racial images pose risks regardless of the motives that generate them.

5. I found no comprehensive treatment of racial imagery in the criminal process and no articles or notes that discuss the use of racial imagery by defense counsel or witnesses.

I found two student-written notes that focus on prosecutorial misconduct involving racially inflammatory remarks. The first note addresses only the use of overtly inflammatory remarks and most of its discussion concerns the appropriateness of a harmless error rule in such cases, rather than the definition or discernment of racially inflammatory remarks. *See* Steven D. DeBrota, Note, *Arguments Appealing to Racial Prejudice: Uncertainty, Impartility and the Harmless Error Doctrine*, 64 IND. L.J. 375 (1989). The more recent note contains an interesting survey of cases, and attempts to define two forms of prosecutorial racism: explicit references to race and indirect references that a reasonable person would discern contain racial undertones. *See* Elisabeth L. Earle, Note, 92 COLUM. L. REV. 1212 (1992). The note argues for the judicial identification of these two forms of racism regardless of the existence of a remedy, but specifically eschews discussion of remedies as beyond the scope of the note. *Id.* at 1214 n.12. The only other significant modern consideration of prosecutorial comments on race is a three-page section in a *Harvard Law Review* Developments note. *Developments in the Law*—Race and the Criminal Process, 101 HARV. L. REV. 1472, 1588-90 (1988). In most descriptions of prosecutorial misconduct, only a few lines of text are devoted to racial arguments. *See infra* notes 27-33 and accompanying text.

Perhaps the lack of attention to the use of racial imagery in criminal cases stems from a perception that resort to such imagery is rare. Or perhaps disinterest may be traced to the belief implicit in the above-quoted contemporaneous evaluation of the likely effects of Koon's and Powell's animal imagery: such imagery will seldom sway the jury as intended and may even backfire, benefitting the subject of the imagery. A third noninvidious interpretation might be proferred: lawyers and laypeople are unaware that the law is largely silent here and assume that whatever the frequency of racial imagery in criminal cases, and whatever its effect might be on juries, injustices are corrected.

There is also selective indifference[6] to consider. Half of the population is female and many women could identify with the rape victim cross-examined on the details of her sexual life to facilitate summation arguments that she was a consenting whore. There are fewer people of color to identify with racial derogation on the witness stand and in summations. There were also many men with wives, girlfriends, sisters, daughters, and women friends who could worry about the treatment of rape victims; the absence of cross-cutting ties between most white people and people of color makes empathetic activism regarding racial imagery less likely.

Less charitable explanations press themselves upon us. One obvious candidate is self-interested denial. Acknowledging the continuing legacy of racism is painful and unpleasant, at least for white people;[7] it implies that many of us do not deserve all we have and that our good fortune is gained through the exploitation of others. Some people find it hard enough to acknowledge racism when that racism is expressed by aberrational racist skinheads[8] or construction workers.[9] It is even harder when we are confronted with the racism of—and the

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6. *See* Paul Brest, *The Supreme Court, 1975 Term—Forward: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 7-8 (1976).

7. Professor Derrick Bell suggests that it may also be difficult for black people "who are not on the deprived end of the economic chasm between blacks and whites" to acknowledge the persistence of racism. DERRICK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM 13 (1992).

8. In Dawson v. Delaware, 112 S. Ct. 1093 (1992), the Supreme Court held that membership in a white racist gang was not relevant to whether imposition of the death penalty was warranted and that the introduction of evidence of such membership at trial violated the defendant's First and Fourteenth Amendment rights. It is difficult for me to explain this decision as the result of either antideath penalty sentiment or First Amendment vigilance given this Court's other contemporaneous decisions. *See also* R.A.V. v.

manipulation of racism by—"professionals." Perhaps we not only benefit from skin privilege; perhaps we tolerate it in our own ranks. Looking at a professional's use of racial imagery compounds this discomfort, for when we examine the speech patterns and images other professionals use, comparisons to our own everyday remarks will nag at the edges of our thought. Maybe we do more than tolerate skin privileging—maybe we practice it.[10]

Even more vile explanations are possible, but hinting at their existence may be enough. I will not speculate further; instead, I will start to fill the void. I proceed on a cautiously optimistic assumption: at least part of the inattention to racial imagery stems from noninvidious ignorance. This Article therefore attempts to redress some of that ignorance. Part I describes some of the many ways racial stereotypes are presented to the jury in criminal cases; Part II reviews the paltry legal remedies presently available; and Part III proposes and evaluates other measures that could be taken in an attempt to control the manipulation of racial stereotypes in criminal cases. Thus, for the bulk of this Article I proceed by assuming that information and logical argument may be persuasive. At the end, however, I return to the possibility of more invidious reasons for the void, and consider whether the self-righteousness and self-interest of white people preclude the redressing of ignorance in this area.

If this introduction rankles, I do not apologize. I do, however, wish to make clear that the subject of my scrutiny is not other, but same: my culture, my language, indeed, myself. I am white. As I began writing the immediately preceding paragraph, what came to my mind first was, "Other, darker, explanations are possible." That was, of course, both the right and the wrong image. (Why does "darker" capture such a vast range of negative possibilities?[11]) It is impossible for me to begin without at

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City of St. Paul, 112 S. Ct. 2538 (1992) (finding bias-motivated crime ordinance an impermissible content distinction).

9. *See* Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (finding insufficient evidence of discrimination in the construction industry to justify affirmative action plan despite the fact that the population of Richmond was half black and less than one percent of the city's prime construction contracts had been awarded to minority businesses during a five-year period).

10. *See* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 339-44 (1987).

11. It may be that the origin of darkness-as-evil imagery is an instinctual fear of the dark. Whatever its origins, darkness imagery is now inextricably entwined with the omnipresent black-as-dark, Black-as-African (or African-American), black-as-evil imagery so

least this much candor: I have met the enemy, and she is us.

I. THE PREVALENCE AND PERNICIOUSNESS OF RACIAL IMAGERY IN CRIMINAL CASES

Racial imagery is a species of bias of which there are several subspecies (here, too, the taint of racial connotations). Racial imagery may be categorized in several ways because it varies in its source and setting, in the subtlety and indirection of its presentation, and in the aspect of racial stereotype or animus it evokes. Variation along each of these dimensions multiplies the opportunities for mutually reinforcing introductions of bias.

A. The Source and Setting of Racial Imagery

Racial imagery can be conveyed in pictures, stories, examples, and generalizations. These visual and auditory experiences may themselves generate a racial image, or they may recall for the observer racial imagery to which she was exposed at an earlier time. Because race is such a salient characteristic in our society,[12] a juror will notice the race of the defendant, the witnesses, the attorneys, the judge, and other jurors. What each juror will "see" when she observes an African-American judge, a white defendant, a Latino witness, or an Asian-American prosecutor will be affected by what happens in the courtroom, but what she "sees" happening in the courtroom will be affected by her prior exposure to racial imagery. The racial imagery that affects a particular juror's decision-making process is therefore impossible to catalog.

We can, however, acknowledge a vast and varied set of racial experiences and racial images with which jurors begin. Indeed, were there not such preexisting images, there would be little incentive for the parties to invoke racial images during the course of the trial. As we move to events surrounding a particular case, we will not consider how bias is *created*, but note the settings and sources within that case where preexisting racial images are repeated, recalled, and reshaped.

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that one cannot use a darkness-as-absence-of-sunlight image without racial connotations. It might, of course, be different in another culture; however, in this culture, declaring that one did not intend a racial meaning does not prevent a racial resonance.

12. *See, e.g.*, Marilynn B. Brewer, *A Dual Process Model of Impression Formation*, *in* ADVANCES IN SOCIAL COGNITION 1, 6 (Thomas K. Sprull & Robert S. Wyers, Jr. eds., 1988); Eliot R. Smith & Michael A. Zarate, *Person Categorization and Stereotyping*, 8 SOC. COGNITION 161 (1990).

1. Pretrial Publicity

Newspaper reports of crime generally include the race of the perpetrator only when he or she is a person of color; moreover, crimes against whites perpetrated by persons of color are likely to get more coverage than other interracial crimes or crimes where the perpetrators and victims are of the same race.[13] Sometimes the media frenzy, while ostensibly not racial, will indelibly imprint race as the primary image of the case. The Charles Stuart murder case in Boston and the Central Park jogger case are prime examples of this phenomenon. With regard to the Stuart case, after Stuart committed suicide it became obvious that he had played on racial fears when he concocted the story that he and his pregnant wife were shot by a black man. Media commentators also noted that race certainly had a role in the police decision not to investigate inconsistencies in Stuart's story, but instead to instigate a sweeping, unconstitutionally intrusive manhunt directed at African-American males.[14] When public pressure mounted, the police pressed Stuart to make an identification of the assailant and he picked a vulnerable black man out of a line-up. Could *anyone* argue that he would have gotten a color-blind trial?

The Stuart case exemplifies the risk that an innocent person may get caught up in overwhelmingly powerful racial pictures. But an injustice is also wrought—to the defendants and to the ethnic group to which they belong—if the guilty are judged guilty long before the trial begins. In the Central Park jogger case, journalists criticized the black lawyers who claimed that racial motives led authorities to frame their clients.[15] Without

13. Abbott & Calonico, *Black Man, White Woman—The Maintenance of a Myth: Rape and the Press in New Orleans, in* CRIME AND DELINQUENCY: DIMENSIONS OF DEVIANCE 141, 147, 149 (M. Riedel & T. Thornberry eds., 1974) (noting that press reports overemphasize black-on-white rape and white respondents see reality as consistent with news reports); Kirk A. Johnson, *Objective News and Other Myths: The Poisoning of Young Black Minds*, 60 J. NEGRO EDUC. 328 (1991); Ellis Cose, *Rape in the News: Mainly About Whites*, N.Y. TIMES, May 7, 1989, § 4, at 27 (stating that race is part of the determination of what is news and any suggestion of violence across racial lines is likely to push story onto front page); *see also* Jean-Marie B. Mayas, Perceived Criminality: The Attribution of Criminal Race from News-Reported Crime (1977) (unpublished Ph.D. dissertation, University of Michigan) (stating that white readers overwhelmingly ascribed violent crimes to black perpetrators even though the reports did not supply a basis for that attribution).

14. *Stuart Dies in Jump off Tobin Bridge After Police Are Told He Killed His Wife; Image Proved Unjust*, BOSTON GLOBE, Jan. 5, 1990, at 1 [hereinafter *Stuart Dies*].

15. *See* Anna Quindlen, *Public and Private: Dirt and Dignity*, N.Y. TIMES, July 22, 1990, § 4, at 19; Sam Roberts, *The Region: For Some Blacks, Justice Is Not Blind to Color*, N.Y. TIMES, Sept. 9, 1990, § 4, at 5; Ronald Sullivan, *Defense Calls Jogger Case a Racist*

condemning or condoning the questions they asked various witnesses, it must be observed that the lawyers were not the ones who injected race into the trial. Could *anyone* in New York have walked into the jury box knowing of the crime without knowing the race of the alleged perpetrators?

Although the media is often blameworthy in such cases,[16] blameworthiness is not the point.[17] In the Rodney King beating case, most of the media was sympathetic to the prosecution, but this did not mean that the white officers failed to benefit from the pretrial publicity. Because the state case was ultimately tried in Simi Valley, the facts that the media used to highlight the officers' racial motivations may actually have been detrimental to the prosecution's case. Whom did it help to repeat the "gorillas in the mist" line over and over again? Whom did it help to foreshadow the trial testimony that pictured King as an animal? Whom did it help to publish the interviews that stressed the size of King's thighs and his resemblance to a football linebacker?[18] The ultimate effects of this racial imagery did not depend on the media's intent; they depended on who sat on the jury.

2. Before the Evidence—Voir Dire and Opening Statements

Voir dire is designed to ferret out bias, but occasionally voir

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Witch Hunt, N.Y. TIMES, Nov. 29, 1990, at B3; Ronald Sullivan, *Judge Rejects Lawyer's Plea in Jogger Trial*, N.Y. TIMES, Oct. 27, 1990, § 1, at 27.

16. Why is the Central Park jogger case so much more compelling than the intraracial rape of a poor black woman (also fairly dramatic because her attackers forced her to jump from a twenty-one story building and she survived only because she caught a television cable) that occurred that same year? *See* Johnson, *supra* note 13, at 328 *passim*. Similarly, in Washington, D.C., why did the case of Daniel Kinard, a black man who was accused of murdering a white college graduate, so fascinate the media despite the fact that the city suffered four hundred and eighty-nine murders—most with black victims—that year? Ellen J. Pollock & Stephen J. Adler, *Justice for All?*, WALL ST. J., May 8, 1992, at A1, A2. Why was the Carol Stuart murder seen as so much more compelling than the numerous other murders—mostly of black and Hispanic victims—during a contemporaneous wave of shootings in Boston? *See Stuart Dies*, *supra* note 14, at 1. Sometimes the media eventually tattles on itself about such disparate coverage, but such confessions do not make the front page day after day. If racial animosity is not part of the answer to these questions, surely racially selective indifference is. *See* Matthew S. Goldberg, *Discrimination, Nepotism, and Long-Run Wage Differentials*, 97 Q.J. ECON. 307 (1982) (arguing that racial nepotism rather than racial animosity explains most discrimination); *see also* BELL, *supra* note 7.

17. When an Eyewitness News Daily News Poll asked New Yorkers which of nine individuals and institutions as making race relations worse in the city, the news media was mentioned by 69% of respondents. Burns W. Roper, *Racial Tensions Are Down*, N.Y. TIMES, July 26, 1990, at A19.

18. *See, e.g.*, Richard A. Serrano, *3 in King Beating Say They Feared for Lives*, L.A. TIMES, May 21, 1991, at A1.

dire may reinforce it. Judges vary in the latitude they permit attorneys who wish to probe bias; sometimes "hypotheticals" that closely resemble the case may be permitted and the phrasing of these hypotheticals may provide a quick sketch of a racial picture. Sometimes attorneys, by their tone and demeanor, may suggest a racial affinity with some jurors and not others.[19]

The opportunity for deliberate manipulation of racial images increases as the trial progresses. Opening statements offer defense and prosecution the chance to outline the case they intend to proffer. Theoretically, quite a bit of imagery is possible here; the attorney is not constrained by evidence already proffered as she will be in closing arguments, but only by her good faith belief that such evidence will be produced. On the other hand, because declaration of a mistrial is relatively cheap so early in the trial, a lawyer may be constrained by the belief that the judge will tolerate less prejudice here than in closing arguments.

3. Testimony

During the presentation of the prosecution and defense cases in chief, racial imagery may be introduced by attorneys or witnesses. Often this is unavoidable. The witness's own race will be apparent to the jury and the witness may testify to facts that inevitably have some racial content. For example, she may be asked to describe the person she saw pointing a gun at the bank teller, and that description will usually include the person's race.[20]

This unavoidable racial content may be stressed either by repetition of a fact ("And then the black man . . . ."), by the words chosen to describe that fact ("He looked Oriental, definitely foreign . . . ."), or by inflection. The race of other persons

19. In jurisdictions where the judge conducts voir dire, he or she may similarly suggest affinity with some jurors and not others. In one extreme example, a judge asked a venireman about inflation and then commented that he did not know why he was speaking to a Japanese juror about inflation because "what do fishheads and rice cost?" Gonzalez v. Commission on Judicial Performance, 657 P.2d 372, 382 (Cal. 1983), *appeal dismissed*, 464 U.S. 1033 (1984). In another criminal case, that same judge asked a black venirewoman who worked in a grocery store if she knew the price of watermelon. *See id.*

20. If the lighting conditions were poor, or the robber wore a mask, the description may not include race because it is unknown to the observer. Often the description will not appear to include race, but it may do so implicitly, as when a white person testifies about the appearance of another white person; because being white is seen as "normal," it need not be reported, just as the presence of two legs and two arms need not be reported.

can be mentioned when it is not necessary to the testimony ("Then me and the other white guys . . . .").

Alternatively, the witness may employ racial imagery by the way she chooses to describe events in dispute or by her interpretation of those events. During the Rodney King police brutality trial, Officer Koon testified that Rodney King "gave out a bear-like yell" and "groaned like a wounded animal," choosing similes that do not explicitly allude to race, but that conjure up stereotypes of black people as subhuman.[21] Koon also testified that King was "very buffed out" and that he interpreted this to mean that King was an ex-con.[22] Koon further explained that he attributed King's unusual strength and insensitivity to pain to the use of the illegal drug PCP.[23] Again, there are no explicit references to race; this time the characterizations resonate with images of black people as criminal.

Finally, a witness may gratuitously offer facts, generalizations, or opinions having racial content that are not germane to the events in dispute. For example, a witness might volunteer the fact that the African-American defendant has a white spouse,[24] or she might make generalizations about the ethnic origins of persons involved in the drug trade.[25] Although the opposing attorney may object to such comments as irrelevant, the image will have been presented to the jury regardless of whether the judge sustains the objection.

Lawyers may also contribute racial imagery during the testimony of witnesses. They may have coached the terms of the description their witness employs or the interpretations she proffers. They may also ask questions that employ their own descriptions and interpretations, particularly on cross-examination. Their demeanor toward a witness or the terms by which they address her may have racial overtones. For example, the state prosecutor in one recent case said to a black witness: "Well you said [the defendant] said that he made a 'bitch' out of the man before he killed him. Does that have any meaning *to you people*?"[26] When an attorney impeaches a witness with her

21. *Sergeant Says King Appeared to Be on Drugs*, N.Y. TIMES, Apr. 21, 1992, at A14.

22. *Id.*

23. *Id.* This image was particularly outrageous because drug testing showed no PCP in King's bloodstream.

24. *See, e.g.*, People v. Nichols, 308 N.E.2d 848, 850 (Ill. App. Ct. 1974).

25. *Cf.* United States v. Doe, 903 F.2d 16, 24 (D.C. Cir. 1990) (prosecutor elicited testimony that Jamaicans were taking over the local drug market).

26. Applicant's Reply to State's Original Answer and Brief at 12, Russell v. Collins,

criminal record, information may be solicited that contributes to racial stereotyping whether or not this is the purpose of the inquiry. Finally, just as witnesses may volunteer information about irrelevant racial matters, attorneys may ask questions that allude to the same issues. Even though the judge will often prohibit an answer and instruct the jury to disregard the question, the insinuation has been made and the image flashed on the screen of the jurors' minds.

4. Closing Arguments and Jury Instructions

Closing arguments permit both defense counsel and the prosecuting attorney to summarize and argue from the evidence. Although neither side may argue facts outside the evidence and both must refrain from arguments that "inflame" the jury, passion, flamboyance, and rhetorical flourish are permitted. Within the bounds of a proper summation, laywers may repeat and stress racial imagery used by witnesses or they may introduce new imagery by their words, metaphors, or demeanor. Moreover, attorneys often stray beyond the bounds of a proper summation without the declaration of a mistrial.[27] Sometimes the opposing attorney hesitates to emphasize the offensive remark by her objection; however, even when she does object, the judge is likely merely to admonish the jury to disregard the offensive remarks. The use of racial imagery in summations is surprisingly common and ranges from overt attempts to inflame racial hostility to subtle reinforcement of racial divisions.[28]

After summations are complete, the judge instructs the jury. She generally will direct jurors to set aside all bias and prejudice; however, some judges may make other remarks that convey racial messages, particularly in jurisdictions where the judge may marshall the evidence.[29]

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944 F.2d 202 (5th Cir.) (No. AC692), *cert. denied*, 112 S. Ct. 30 (1991); *see infra* note 73 and accompanying text.

27. *See infra* notes 168-263 and accompanying text.

28. Most of the reported cases containing some form of racial imagery involve prosecutors' summations. Defense summations may be even worse, but they are rarely the subject of an appeal because the Double Jeopardy Clause bars retrial after an acquittal. I therefore do not catalog here the kinds of racial imagery used in summations, but address them in the course of surveying the specific types of racial imagery that are employed in criminal trials.

29. The reader who does not believe that a judge would ever employ racial imagery should consider some of the remarks that have been reported outside the context of jury instructions. One California judge was disciplined for explicitly racial comments made during sentencing and voir dire; these comments included asking a black woman who

5. Deliberations

Jurors may make explicit or implicit racial arguments in the course of deliberations. Because there is no record of deliberations, it is hard to estimate the frequency with which jurors introduce or reiterate racial imagery. Occasional reports by former jurors, usually persons of color, make it clear though that racial arguments are sometimes made by jurors as well as addressed to them.[30]

This overview makes it plain that a criminal trial provides several sources of, and myriad opportunities to use, racial imagery. The imagery that is in fact employed by these sources is quite varied. Several different schemes are possible for categorizing the content of these racial remarks. To the extent courts have attempted any categorization, they have focused on the

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worked in a grocery store if she knew the price of watermelons. *See, supra* note 19. At least two New York judges have used ethnic slurs in the courtroom. *In re* Fabrizio, 480 N.E.2d 733 (N.Y. 1985); *In re* Agresta, 476 N.E.2d 285 (N.Y. 1985); *see In re* Cerbone, 460 N.E.2d 217 (N.Y. 1984) (judge threatened to use his judicial power against black patrons of a bar and embellished his remarks with racial epithets). A Michigan probate judge, discussing the Michigan law under which minors seeking abortions may request a waiver of the parental consent requirement, stated that he was reluctant to grant waivers, but might do so "in some cases, such as incest or when a white girl is raped by a black man." *Judge Cites Interracial Rape in Abortion Debate*, UPI, Apr. 26, 1991, *available in* LEXIS, Nexis Library, UPI File (cited in T. Alexander Aleinikoff, *The Constitution in Context: The Continuing Significance of Racism*, 63 COLO. L. REV. 325, 332 (1992)). Another judge was found to have repeatedly employed ethnic epithets and slurs in his chambers. *See In re* Stevens, 645 P.2d 99, 99 (Cal. 1982). A Florida judge commented publicly on welfare recipients, black law breakers ("We have been too good to them. They're the ones committing the crimes."), intermarriage, and his doubts about school integration. Larry Rohter, *Judge's Remarks Leave Town in Turmoil*, N.Y. TIMES, Jan. 10, 1992, at A12; *see In re* Petition for Removal of a Chief Judge, 592 So. 2d 671 (Fla. 1992). Additionally, a Massachusetts judge referred to Jewish lawyers with ethnic slurs and, on one occasion, on being informed that a Jewish lawyer was waiting to speak with him, said, "It's time to go warm up the ovens." *At the Bar*, N.Y. TIMES, Feb. 26, 1993, at 16. Judges who have such views are unlikely to conceal them completely from the jury because their demeanor, tone, and emphasis may convey racial messages.

30. For example, in the trial of Keith Mondello for the racially motivated slaying of Yusef Hawkins, one juror said that two white jurors said they "wouldn't convict Mondello in no way form or fashion." *Racial Tension Fueling Attacks on Journalists*, N.Y. TIMES, May 21, 1990, at B2. The Latino juror in the Rodney King beating case made similar statements, noting that she had been mocked for her desire to review the videotape and that "it's like they wanted to see what they wanted to see. They already had their minds made up." Joseph Kelner & Robert S. Kelner, *The Rodney King Verdict and Voir Dire*, N.Y. L.J., May 26, 1992, at 4; *see* People v. Springs, 300 N.W.2d 315, 318 n.4 (Mich. Ct. App. 1980) (black juror asked to be dismissed midway through trial as other jurors had gotten "cold" and one juror said to her during deliberations "we want to get on this prostituting because Pat, you would know about that one, wouldn't you?").

intent of the speaker,[31] but I think that distinctions based on intent are unhelpful here.[32] Whether or not a slur was intended—and that is almost impossible to ascertain[33]—motivation is of little or no importance in assessing the impact of racial imagery on the jury. Instead, in order to facilitate devising a remedy, I consider variation along two other dimensions: (1) the specific racial stereotype or fear that is called on and (2) the subtlety with which that stereotype or fear is evoked.

B. Specific Stereotypes and Fears

There are a variety of racial stereotypes for each disfavored ethnic group. I do not attempt to review all of the possible stereotypes that might be invoked because hypotheticals might be constructed for almost any stereotyped characteristic. Rather, I

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31. Several courts have followed this distinction. *See infra* notes 264-76 and accompanying text (discussing remedies for the use of racial imagery). Professor Elizabeth Earle illustrates two other categorization schemes in the cases. I think her "weight of the evidence" analysis is not a scheme courts use to categorize kinds of imagery, but reflects subsequent determinations about whether the error is harmless or not. What she calls "relevance based scrutiny" is indeed another approach, but one that has been applied as the sole test in only two cases in the last twenty years. *See* Earle, *supra* note 5, at 1212; *supra* note 5 and accompanying text.

32. I have argued elsewhere, Theodore Eisenberg & Sheri L. Johnson, *The Effects of Intent: Do We Know How Legal Standards Work?*, 76 CORNELL L. REV. 1151 (1991); Sheri L. Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611 (1985) [hereinafter Johnson, *Black Innocence*]; Sheri L. Johnson, *Unconscious Racism and the Criminal Law*, 73 CORNELL L. REV. 1016 (1988) [hereinafter Johnson, *Unconscious Racism*], as have many others, that distinctions based on intent are rarely useful with race discrimination issues. *See, e.g.*, Theodore Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U. L. REV. 36 (1977); Alan D. Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1052-57 (1978); Kenneth L. Karst, *The Costs of Motive-Centered Inquiry*, 15 SAN DIEGO L. REV. 1163 (1978); Michael J. Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540 (1977); David A. Strauss, *Discriminatory Intent and the Taming of* Brown, 56 U. CHI. L. REV. 935 (1989).

33. Several commentators have argued that sophisticated discriminators will conceal their motives. *See, e.g.*, Eisenberg, *supra* note 32, at 47-48; Perry, *supra* note 32, at 551; Robert G. Schwemm, *From Washington to Arlington Heights and Beyond: Discriminatory Purpose in Equal Protection Litigation*, 1977 U. ILL. L.F. 961, 1031 (1977). Others have argued that unconscious racism renders it virtually impossible to adduce evidence of purpose when the actor herself is unaware that race influenced her choice. *See, e.g.*, KENNETH L. KARST, BELONGING TO AMERICA 156 (1989); Gayle Binion, *"Intent" and Equal Protection: A Reconsideration*, 1983 SUP. CT. REV. 397, 442 (1984); Paul Brest, *The Supreme Court—1975 Term—Forward: In Defense of the Anti-discrimination Principle*, 90 HARV. L. REV. 1, 6-8 (1976); Johnson, *Black Innocence*, *supra* note 32, at 1650; Johnson, *Unconscious Racism*, *supra* note 32, at 1031; Randall L. Kennedy, McCleskey v. Kemp: *Race, Capital Punishment and the Supreme Court*, 101 HARV. L. REV. 1388, 1419 (1988); Lawrence *supra* note 10, at 318-26.

start by categorizing real cases—all of which are post-civil-rights-era cases and all of which have occurred within the last twenty years[34]—and then extrapolate from them to cases that are probably occurring but about which we do not have reliable information. Before starting, I should note that this section does not separately discuss cases in which people of color have used racial imagery. There are, of course, some such cases that the media documents assiduously.[35] I do not focus on them for three reasons: first, they are few in number; second, they already receive a disproportionate amount of attention; third, they are less likely to obstruct justice.[36]

Most starkly, black may be identified with evil and white with good. Perhaps because the imagery is so extreme, invocations of it tend to be somewhat indirect. It was a "black Sunday" when the black defendant set out after his white victims.[37] In another case involving an African-American defendant the prosecutor described the victim as a "nice white lady."[38]

Closely related is the image of African Americans as more violent and more criminal than whites. Thus, one prosecutor said that a defendant "had to play Superfly," alluding to a fictional black criminal.[39] Another prosecutor, seeking to impeach the veracity of a defendant's contention that, at the time of his arrest, he believed that the three arresting plain clothes officers were muggers, repeatedly argued that the African-American defendant could not have believed that white men were muggers.[40] In one case with a black defendant and black victim, the

34. I do not examine earlier cases because I wish to avoid arguments about how much things have changed. I have not observed any dramatic changes during the 20-year span I do cover—neither in the kinds of imagery employed nor in judicial responses to that imagery.

35. The Central Park jogger case is one example. *See supra* note 15. The Marla Hanson case is another. *See* George James, *Man Given 5 to 15 Year Term in Model's Slashing*, N.Y. TIMES, May 12, 1987, at B4; *see also Defense Lawyer Says He Is "the Victim,"* Mar. 28, 1987, § 1, at 31; E.R. Shipp, *Defense Lawyers' Tactics: Unfair or Just Aggressive*, N.Y. TIMES, Apr. 21, 1987, at B1. Perhaps the most ballyhooed case of racial manipulation by an African-American defendant is the drug prosecution of the former mayor of Washington, D.C., Marion Barry.

36. The obvious exception may be Marion Barry's drug prosecution, but that case is extraordinary in many respects. Herman Schwartz, *Rough Justice: Verdict in the Marion S. Barry Case*, NATION, Sept. 10, 1990, at 1.

37. State v. Wilson, 404 So. 2d 968, 969 (La. 1981).

38. State v. Greene, 542 So. 2d 156, 157 (La. Ct. App. 1st Cir.), *writ denied*, 548 So. 2d 1229 (La. 1989).

39. Smith v. State, 516 N.E.2d 1055, 1064 (Ind. 1987), *cert. denied*, 488 U.S. 934 (1988).

40. People v. Thomas, 514 N.Y.S.2d 91, 92-93 (App. Div. 1987); *see* People v.

prosecutor discussed at some length the prevalence of black crime generally and of black-on-black crime in particular and argued that this Detroit pattern should not be permitted to reach Joliet.[41] In a similar case, the prosecutor said: "Ninety percent of all murders are committed by blacks on blacks" and, "Its [sic] time to say 'We're not going to allow this kind of conduct to go on in our city anymore.' "[42] In yet another case, the prosecutor argued that the local drug market was being taken over by Jamaicans and introduced expert testimony to that effect; the only relevance of this assertion to the case was the Jamaican ancestry of the defendants.[43] In a peculiar twist on the propensity argument, a prosecutor argued that the defendant must have entered the robbed premises because the codefendant would never have let "him sit out there—I don't mean to be racial about this . . . do you think you're going to leave a black guy out there in a car, or a big car while a robbery is going on?"[44]

Some of the testimony and argument in the Rodney King beating case also conjured up the image of black people as criminal; Officer Koon described King as "very buffed out, very muscular" from which he said he concluded "that he was probably an ex-con."[45] Racial images related to criminality are not limited to African Americans. In a case involving recent Italian immigrants, both defense counsel and prosecutor argued about Al Capone and "The Godfather."[46] In a case involving Native-American defendants, the prosecutor argued that "when you see an Indian that drinks liquor, you see a man that can't handle it"

Traylor, 487 N.E.2d 1040, 1042 (Ill. App. Ct. 1985) (prosecutor argued that police officers' approach to stolen vehicle could be explained by fact that they were "white policemen in a black neighborhood").

41. People v. Lurry, 395 N.E.2d 1234, 1237 (Ill. App. Ct. 1979).

42. State v. Noel, 693 S.W.2d 317, 318 (Mo. Ct. App. 1985); *see* State v. Franklin, 526 S.W.2d 86, 90 (Mo. Ct. App. 1975) (in a robbery case with a black defendant, a prosecutor remarked in closing that 85% of crime victims in a particular city were people who have to live in black areas or who do live there).

43. United States v. Doe, 903 F.2d 16 (D.C. Cir. 1990); *see* Russell v. State, 518 A.2d 1081, 1085 (Md. Ct. Spec. App. 1987) (prosecutor refers to "Jamaican drug trafficking" in his opening statement, and a police officer made the same remark in his testimony about his subspecialty as a narcotics officer).

44. State v. Snowden, 675 P.2d 289, 293 (Ariz. Ct. App. 1983).

45. *Sergeant Says King Appeared to Be on Drugs*, N.Y. TIMES, Mar. 20, 1992, at A20.

46. Commonwealth v. Graziano, 331 N.E.2d 808, 812 (Mass. 1975); *see* Haas v. State, 247 S.E.2d 507, 510 (Ga. Ct. App. 1978) (prosecutor repeatedly refered to an alias used in the indictment, to an Italian connection, and to the defendant as a "Sicilian,") *cert. denied*, 440 U.S. 922 (1979); *see also* State v. Filipov, 576 P.2d 507 (Ariz. Ct. App. 1977) (prosecutor refers to recent immigrant as "gypsy" and compares him to Sicilians).

and that such drinking leads to violence.[47] In another case the prosecutor asked the defendant, "Isn't it true in gypsy practice that it is Okay to lie and cheat and steal if you can get away with it?"[48]

Equally abhorrent are portrayals of persons of color as animal-like or subhuman in some other way. The King beating case provides a small menagerie of such images. Officer Koon testified that King showed "Hulk-like strength," "gave out a bear-like yell," and "groaned like a wounded animal."[49] Powell recalled that Mr. King fell "like a rag doll" and repeatedly described King's movements as "unnatural."[50] Additionally, Powell was cross-examined about a computer message he typed shortly before the beating in which he described an earlier incident, involving black people, as "right out of 'Gorillas in the Mist.' "[51] Powell denied that he saw Rodney King as nonhuman; however, when the prosecutor asked, "he wasn't an animal, was he?" Powell responded, "No, just acting like one."[52]

Animal imagery is actually quite common in prosecutors' summations, perhaps because not all courts deem it impermissible. In a few recent cases, the racial import of these terms is clear;[53] in one case, the prosecutor characterized the defendant as "scum" who committed crimes in "our streets" and not in "some ghetto."[54] In most cases where the defendant complains of animal imagery, the court does not discuss the ethnicity of the defendant; occasionally, however, the defendant's name or other details of a particular case make it clear that courts are ignoring the interaction of such imagery with the defendant's race or ethnicity.[55] Sometimes the reference to subhumanity is more

47. Soap v. Carter, 632 F.2d 872, 878 (10th Cir. 1980) (Seymour, J., dissenting), *cert. denied*, 451 U.S. 939 (1981); *see* United States v. Rodriguez Cortez, 949 F.2d 532, 540 (1st Cir. 1991) (trial court admitted evidence of defendant's Colombian identity as probative of his membership in a narcotics conspiracy with other Colombian members).

48. Stanton v. State, 349 So. 2d 761, 764 n.1 (Fla. Dist. Ct. App. 1977).

49. *See Notebook*, *supra* note 1, at A14.

50. *Id.*

51. *Id.*

52. *Id.*

53. *See, e.g.*, State v. Wilson, 404 So. 2d 968, 969-70 (La. 1981) (district attorney's remarks "contained repeated references to 'whitey' and 'white honkies' in connection with defendant's supposed characterization of whites and to 'animals' as a description of the defendants").

54. People v. Nightengale, 523 N.E.2d 136, 141 (Ill. App. Ct. 1988), *appeal denied*, 520 N.E.2d 258 (Ill. 1988).

55. *See, e.g.*, People v. Rivera, 426 N.Y.S.2d 785, 786 (App. Div. 1980) (referring to defendants as the "wolves of this society"). For an older such case, see Miller v. State, 163

oblique, as when a prosecutor asked whether it was reasonable to believe the victim would consent to sex with ". . . that?"[56] Other degrading, dehumanizing imagery includes the use of the word "n*****,"[57] other ethnic slurs,[58] and the practice of referring to a minority defendant by his or her first name.[59]

In other cases, prosecutors play on the supposed sexual appetite of, or the supposed sexual threat posed by, black men. In the rape case variation, the prosecutor argues, sometimes in hysterical terms,[60] that the victim, a white woman, would never have consented to have sex with the defendant because he is a

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S.E.2d 730, 734 (Ga. 1968); *see also* State v. Wilson, 404 So. 2d 968 (La. 1981) (court found no racial prejudice in black defendant case with three summation references to animals); Commonwealth v. Layton, 376 N.E.2d 150, 153 (Mass. App. Ct. 1978) (farfetched to think arguments about streets of commonwealth becoming a "jungle" were racially motivated in black defendant robbery case).

56. Thomas v. State, 419 So. 2d 634, 635 (Fla. 1982); *see* Patterson v. Commonwealth, 555 S.W.2d 607 (Ky. Ct. App. 1977) (in black defendant-white victim case, in which prosecutor said, "[I]t's hard for me to tell people of the Negro race apart," he also said rape was not conduct befitting "a member of the human race").

57. I am neither willing to use that word, nor able to see a need for its use. However, cases in which that epithet is used still occur, albeit less often than in the past. *See, e.g.*, Thornton v. Beto, 470 F.2d 657, 658-59 (5th Cir. 1972), *cert. denied*, 411 U.S. 920 (1973); Kornegay v. State, 329 S.E.2d 601, 603 (Ga. 1985); People v. Walker, 411 N.Y.S.2d 377, 378-79 (App. Div. 1978); Sparks v. State, 563 S.W.2d 564, 567-78 (Tenn. Crim. App. 1978); *see also* McBride v. State, 338 So. 2d 567, 568 (Fla. Dist. Ct. App. 1976); *In re* Agreste, 476 N.E.2d 285 (N.Y. 1984) (*judge* used the phrase "n*****s in the woodpile" in open court in a trial involving two black defendants).

58. In State v. Martinez, 658 P.2d 428, 430 (N.M. 1983), the prosecutor referred to the defendant as a "chola punk," a term which I might not repeat if I either knew what it meant or knew how to signal it. In People v. Wilson, 198 N.W.2d 424, 426-27 (Mich. Ct. App. 1972), both the prosecutor and the defense counsel referred to the defendant and his companion as "colored," and in State v. Parker, 509 P.2d 272, 273 (N.M. Ct. App. 1973), the prosecutor referred to black persons as "colored."

59. In Hamilton v. Alabama, 376 U.S. 650 (1964) (facts reported in Bell v. Maryland, 378 U.S. 226, 248 n.4 (1964) (Douglas, J., concurring)), the Supreme Court reversed a contempt conviction against a black witness who refused to answer due to a solicitor's insistence on calling her by her first name. It would be a mistake to conclude that minority defendants and witnesses are not presently so degraded—such tactics do not lead to published reports in most circumstances. The King beating case provided one example of a witness using a black adult's first name. However, as the courtroom tapes reveal, the prosecutor corrected the witness. I suspect this is not unusual. One of my clients was referred to by the prosecutor in the course of an extremely inflammatory summation as "Pedro." *See* People v. Arroyo, 431 N.E.2d 271 (N.Y. 1982); *see also* State v. Torres, 554 P.2d 1069, 1071 (Wash. Ct. App. 1976) (prosecutor repeatedly referred to defendants as Mexicans or Mexican Americans while referring to the complaining witness with a more formal "Ms." or "Mrs.").

60. For repeated and extensive comments, see Reynolds v. State, 580 So. 2d. 254, 256 (Fla. Dist. Ct. App. 1991); *see also* Miller v. North Carolina, 583 F.2d 701, 704 (4th Cir. 1978) ("[T]he average white woman abhors anything of [a sexual] nature that had to do with a black man.").

black man.[61] In cases not involving sexual assault, sexual threat imagery is exploited when the prosecutor directs the jury's attention to a fact irrelevant to the case: that the black defendant has had one or more sexual relationships with white women.[62] A particularly extreme example of this tactic is found in a 1987 Nevada case involving a death penalty hearing in which the prosecutor directed the jury's attention to the defendant's "preference for white women" and his "physical relationship" with a white woman.[63] Finally, in a case involving a white male victim, the prosecutor argued that the man had to be telling the truth, because his story included an account of intercourse with a black woman and "[i]f he is going to lie about anything else, he wouldn't admit having intercourse with a black woman."[64]

Black dishonesty is another racial image that has been exploited by prosecutors. At one time it was relatively common to find cases in which attorneys argued that African Americans are generally less trustworthy witnesses, and I have found three recent cases in which prosecutors made that argument quite directly. In one, the prosecutor said: "Not one white witness has been produced in this case that contradicts [the white prosecution witness's] position in this case."[65] In the second such case, the prosecutor characterized the testimony of a black defense witness as "shucking and jiving on the stand."[66] Finally,

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61. *See, e.g.*, *Miller*, 583 F.2d at 704; *Reynolds*, 580 So. 2d at 256; State v. Thomas, 777 P.2d 445 (Utah 1989); State v. Bautista, 514 P.2d 530, 532-33 (Utah 1973); *see also* Rhoden v. State, 274 So. 2d 630, 635 (Ala. Crim. App. 1973) (in an interracial rape case replete with references by both prosecutor and defense counsel to white lady and "white woman," prosecutor told jury that if they believed the complaining witness, they would have to believe that defendant "took it, he got him a white woman"); State v. Mayhue, 653 S.W.2d 227, 237 (Mo. Ct. App. 1983) ("[N]o person in their right mind would want to remember three black men getting on her naked body . . . .").

62. *See, e.g.*, Johnson v. Rose, 546 F.2d 678, 678 (6th Cir. 1976); United States v. Grey, 422 F.2d 1043, 1045 (6th Cir.), *cert. denied*, 400 U.S. 967 (1970); Weddington v. State, 545 A.2d 607, 610 (Del. 1988); People v. Nichols, 308 N.E.2d 848 (Ill. App. Ct. 1974); People v. Springs, 300 N.W.2d 315, 318 (Mich. Ct. App. 1980); State v. Parker, 509 P.2d 272, 272 (N.M. Ct. App. 1973); *see also* State v. Deas, 212 S.E.2d 693, 694 (N.C. Ct. App.) (prosecutor argued that if motel operator had seen a white woman in the car when the black defendant was registering as man and wife, he would have remembered it because "it don't happen in Transylvania County; it may happen in Charlotte, but it don't happen in Transylvania County"), *cert. denied*, 215 S.E.2d 626 (N.C. 1975).

63. Dawson v. State, 734 P.2d 221, 223 (Nev. 1987); *see Nichols*, 308 N.E.2d at 852-53 (prosecutor's closing argument referred to the fact that the black defendant was married to a white woman).

64. People v. Richardson, 363 N.E.2d 924, 926 (Ill. App. Ct. 1977).

65. Withers v. United States, 602 F.2d 124, 125 (6th Cir. 1979).

66. Smith v. State, 516 N.E.2d 1055, 1064 (Ind. 1987), *cert. denied*, 488 U.S. 934 (1988).

in the third case, referring to the black defendant and his black witnesses as "street people," the prosecutor said, "they lie every day."[67] One variation on the dishonesty image is that African Americans[68] are likely to lie when they testify for each other[69] and likely to tell the truth when they testify against each other.[70] An interesting interracial twist on this argument is presented by a case where the prosecutor argued that the testimony of the defendant's alibi witness, a white woman living with a black man, should be doubted because the witness had faced a lot of social disapproval and would therefore be more likely to lie for the defendant.[71]

Another specific brand of racial imagery common in prosecutor misconduct cases is what I call "us-them" imagery. In its most outrageous form, it portrays black-on-white violence as more horrible than other violence—implying that the jury must act to restrain future interracial crimes. Thus, in one case with a black victim and a black defendant, the prosecutor said that if the jury released the defendant, "maybe the next time it won't be a little black girl from the other side of the tracks; maybe it will be somebody that you know."[72] In a very recent capital murder trial, the prosecutor rhetorically asked the jury: "Can you imagine the fear that [the victim] went through with three blacks?"[73] In another case the state's attorney characterized the defendant as "scum" who committed a crime in "our streets" and "not in some ghetto."[74] In a fourth case, the prosecutor argued that the defendant's homicidal act was caused by the racial tenets of the Black Muslim religion.[75] Likewise, in several cases prosecutor's

67. *Richardson*, 363 N.E.2d at 926; *see* State v. Kamel, 466 N.E.2d 860, 866 (Ohio 1984) (prosecutor argued that defense witnesses were unreliable by reason of their foreign birth in the Mideast).

68. Earlier cases involve arguments about other ethnic in-group lying. *See* 2 JOHN H. WIGMORE, WIGMORE ON EVIDENCE § 516, at 722-25 (2d ed. 1978). I found only one recent example of an ethnic in-group lying argument, which involved the prosecutor's argument that defense witnesses, who were natives of Syria, were unduly biased because they were the defendant's "countrymen." *Kamel*, 466 N.E.2d at 866.

69. *Richardson*, 363 N.E.2d at 926; People v. Kong, 517 N.Y.S.2d 71, 72 (App. Div. 1987).

70. McFarland v. Smith, 611 F.2d 414, 416 (2d Cir. 1979); People v. Bramlett, 569 N.E.2d 1139, 1145 (Ill. App. Ct.), *appeal denied*, 580 N.E.2d 121 (Ill. 1991).

71. State v. Terry, 582 S.W.2d 337, 339 (Mo. Ct. App. 1979).

72. Kelly v. Stone, 514 F.2d 18, 19 (9th Cir. 1975).

73. Petition for Writ of Certiorari at 18, Russell v. Collins, 944 F.2d 202 (5th Cir.) (No. AC692), *cert. denied*, 112 S. Ct. 30 (1991).

74. People v. Nightengale, 523 N.E.2d 136, 141 (Ill. App. Ct. 1988).

75. Commonwealth v. Mahdi, 448 N.E.2d 704, 711-12 (Mass. 1983).

have drawn on fears of racial revenge by arguing that black or Latino defendants with white victims were motivated by racial animosity, despite the lack of any evidence regarding the defendant's motives.[76] There are also a number of cases in which racial animosity is fueled by the attribution of an ethnic slur like "honkey"—often without basis in the record.[77]

The second form of "us-them" imagery focuses on how different "they" are. While this form of imagery might seem milder, some summations employing such imagery are breathtakingly long and digressive descents into stereotyping. In one case, the transcription of the prosecutor's racial remarks required two pages of the reporter and began with a discussion of whether the defendant would be considered a "n*****" in his own community.[78] In another case, the prosecutor discussed "colored" people as people who wear "exotic" hairstyles, straighten their hair, and wear unusual sideburns, and further argued about the early sexual maturity of black people and their inability to do or know things that are "commonplace for the ordinary person."[79] In yet another case, the defense attorney told the jury that he had told the defendants, " 'Y'all n*****s 40 or 50 years ago would be lynched for something like this, but you're not under the law guilty of rape because these people are as guilty as you are,' " and reinforced these statements with

76. *See, e.g.*, Carter v. Rafferty, 621 F. Supp. 533, 538 (D.N.J. 1985); People v. Sales, 502 N.E.2d 1221, 1225-26 (Ill. App. Ct. 1986); State v. Snedecor, 294 So. 2d 207, 209 (La. 1974); State v. Jones, 283 So. 2d 476, 477 (La. 1973); People v. Rivera, 523 N.Y.S.2d 834, 835 (App. Div.), *aff'd*, 540 N.Y.S.2d 233 (1988); *see also* People v. Flores, 398 N.E.2d 1132, 1136 (Ill. App. Ct. 1979) (prosecutor argued that differences in nationality between defendants from Puerto Rico and victim from Mexico may have motivated the crime).

77. *See, e.g.*, United States v. Haynes, 466 F.2d 1260, 1265 (5th Cir. 1972) (prosecutor said "burn, baby burn" to African-American defendant); Dixon v. State, 325 S.E.2d 893, 895 (Ga. Ct. App. 1985) (prosecutor elicited inadmissible hearsay including defendant's purported reference to victim as "this honkey"); People v. Turner, 367 N.E.2d 1365, 1366 (Ill. App. Ct. 1977) (prosecutor falsely stated that black witness had said he was going to have a good time watching two black girls "beat up whitey"); State v. Wilson, 404 So. 2d 968, 969 (La. 1981) ("whitey" and "white honkies"); *see also* United States v. Harvey, 756 F.2d 636, 649 (8th Cir.), *cert. denied*, 474 U.S. 831 (1985) ("honkey"); *cf.* McBride v. State, 338 So. 2d 567, 568 (Fla. Ct. App. 1976) ("n*****" accurately attributed to white defendant in a case with black jurors).

78. People v. Walker, 411 N.Y.S.2d 377, 378-79 (App. Div. 1978).

79. United States *ex rel.* Haynes v. McKendrick, 481 F.2d 152, 154-55 (2d Cir. 1973); *see* People v. Flores, 398 N.E.2d 1132, 1136 (Ill. App. Ct. 1979) (referring to a defendant's Puerto Rican origins and a victim's Mexican origins, prosecutor said he didn't know why people rob each other when they "are practically neighbors; they speak Spanish, all of them"); Sparks v. State, 563 S.W.2d 564, 567-68 (Tenn. Crim. App. 1978) (digression on what the use of ethnic slurs means between two black people, depending on whether or not white people are present).

what the reviewing court described as "further demeaning references and stories regarding race."[80] In a fourth case, previously mentioned for the prosecutor's argument that Native Americans have a propensity for alcohol abuse and violence, the prosecutor also commented:

> You try to impress upon people that they can change—that they should change, and there is a decent way of going through life without violence, without committing crimes and still you can enjoy life and obtain things and goals in your life, but some people don't live that way, and they won't live that way. That's what you have in this case. You have a class of people and a situation that exists that you and I can't change irrespective of what we do . . . but I submit to you that the facts surrounding this are typical of the community in which this accident occurred . . . and there is nothing you and I can do to change that situation, other than you can suggest with your verdict in this case what you want to do, what kind of standard you want to ask or set in this country.[81]

There is also an interracial twist to "us-them" imagery. For example, a white defendant's association with black people and use of black witnesses has been the subject of prosecutorial comment.[82]

Finally, there are a large number of cases in which no specific racial imagery is called on, but where the race of various parties is "mentioned" without any apparent reason for doing so. (Of course, racial images may be dredged up even when race is relevant, as it is in a description of the perpetrator of a crime or when the behavior of some person has a racial motive.[83]) Some of these references are clearly racial, but their meaning is

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80. Kornegay v. State, 329 S.E.2d 601, 603 (Ga. Ct. App. 1985).

81. Soap v. Carter, 632 F.2d 872, 878 (10th Cir. 1980); *see* Commonwealth v. Tirado, 375 A.2d 336, 337-38 (Pa. 1977) (prosecutor elicited "expert testimony" as to social values of Puerto Rican males, their honor system, and the importance of saving face in a confrontation).

82. People v. Dukett, 308 N.E.2d 590, 596 (Ill.), *cert. denied*, 419 U.S. 965 (1974); *see* Herring v. State, 522 So. 2d 745, 746 (Miss. 1988) (prosecutor asked whether black members of the jury could vote for a fair verdict and noted some belief that a jury with eight black people would not vote for a life sentence for a black person raping a white person); Commonwealth v. Morgan, 401 A.2d 1182, 1190 (Pa. Super. Ct. 1979) (prosecutor asked whether it was likely that a white woman would have patronized a predominantly black bar, as the defendant had claimed).

83. *See, e.g.*, Commonwealth v. Washington, 549 N.E.2d 446, 447 (Mass. App. Ct.), *review denied*, 552 N.E. 2d 863 (Mass. 1990) (explaining victim's failure to report crime to persons with whom she had contact immediately after crime had occurred as due to those persons being black and the victim being afraid of black people).

unclear.[84] Others look quite innocuous. For example, in one case the prosecutor made reference in his opening statement to the victim, "a young black male."[85] More discomfitting is the reference to the defendant as "a black kid from Detroit."[86] Knowledge of the context (often not provided by appellate court opinions)[87] can render a single reference very disturbing. For example, in the Rodney King beating case the defendants' attorney's single injection of the adjective "black" when describing the man the police officers saw gains power from the racial imagery rampant in the defendant's testimony. Similarly, some powerful, albeit unspecified, racial content is carried by the sentence: "Can you imagine her state of mind when she woke up at 6 o'clock that morning, staring into the muzzle of a gun held by this black man?"[88] Even passing references to a defendant's Colombian nationality in a narcotics case is likely to be harmful.[89] Naturally, repeated references to the race of the victim or defendant are more provocative than a single reference.[90]

Because this set of image categories is largely derived from prosecutorial questioning and summation, it undoubtedly neglects some contexts in which these images are used. While I would expect a substantial degree of overlap, defense counsel and her witnesses may find somewhat different stereotypes use-

84. For example, in State v. Brown, 636 S.W.2d 929, 937 (Mo. 1982) (en banc), *cert. denied*, 459 U.S. 1212 (1983), the prosecutor argued that judges, reporters, prosecutors and police officers could all do their jobs " 'til we're black in the face." "Unless you do your job," their efforts would be useless. Given a black defendant and a white victim, it seems unlikely that the substitution of "black" for "blue" in the colloquial expression is nonracial, but the meaning of the substitution is uncertain. *See also* People v. Springs, 300 N.W.2d 315, 318 (Mich. Ct. App. 1980) (prosecutor asked what the race of defendant's prior trial counsel was).

85. State v. King, 573 So. 2d 604, 605 (La. Ct. App. 2d Cir. 1991).

86. Sanders v. State, 428 N.E.2d 23, 28 (Ind. 1981).

87. For an extreme example of lack of context, *see* People v. Dupree, 487 N.Y.S.2d 847, 848 (App. Div. 1985) (holding defendant not deprived of a fair trial by prosecutor's improper injection of race into the case without describing what the prosecutor had said).

88. *See* Blair v. Armontrout, 916 F.2d 1310, 1347 (8th Cir. 1990) (Harvey, J., dissenting), *cert. denied*, 112 S. Ct. 89 (1991).

89. *See, e.g.*, United States v. Chase, 838 F.2d 743, 750 (5th Cir., *cert. denied*, 486 U.S. 1035 (1988); United States v. Cardenas, 778 F.2d 1127 (5th Cir. 1985); United States v. Yonn, 702 F.2d 1341, 1349 (11th Cir.) (prosecutor and defense attorney refer to defendant's Colombian nationality in narcotics prosecution), *cert. denied*, 464 U.S. 917 (1983).

90. *See, e.g.*, Griffin v. Wainwright, 760 F.2d 1505, 1512 (11th Cir. 1985) (five references to victims of black defendant as "white male boy," "white boy," or "white males"), *cert. denied*, 476 U.S. 1123 (1986); Commonwealth v. Johnson, 361 N.E.2d 212, 219 (Mass. 1977) (repeated references to race of black defendant, white victim, and crime scene in a "project" with a heavy black population); State v. Granberry, 530 S.W.2d 714, 726-27 (Mo. Ct. App. 1975) (repeated reference to defendant's race).

ful. Because acquittals may not be appealed, the range of defense counsel's imagery is not easily accessible. I would speculate that defense attorneys, whatever the race of their clients,[91] might use similar racial images to paint African-American and Latino victims as evil, subhuman (as in the King beating case), criminal, lying, or alien.[92] Defense attorneys may play the sexual threat-sexual appetite imagery differently; images of women of color as more likely to consent to sexual activity[93] might be observed along with images of their supposedly lesser sexual desirability.[94] I suspect that minority prosecution witnesses may be characterized by the defense as less intelligent or competent[95] and, therefore, less able to recall accurately what happened.

C. Blatant and Subtle Racial Imagery

The commentary on prosecutorial misconduct tends to dismiss blatant racial appeals as a relic of a racist past, rarely to be encountered in the present.[96] Whether or not that comfortable

91. In one study on rape prosecutions in Indianapolis, the researcher found that the racial identity of the alleged victim and perpetrator significantly affects the outcome in rape cases. Black men accused of raping white women are treated most harshly; white men accused of raping white women and black men accused of raping black women are treated more leniently. GARY D. LAFREE, RAPE AND CRIMINAL JUSTICE: THE SOCIAL CONSTRUCTION OF SEXUAL ASSAULT 129-47 (1989).

92. In cases where some of the jurors and the defendant are people of color, defense attorneys may also argue another variation of us-them imagery, claiming a racially motivated prosecution when no evidence supports such claims.

93. *See* LAFREE, *supra* note 91, at 219-20 (in Minneapolis rape prosecutions, jurors are less likely to believe black women who allege rape); *see also* W. LANCE BENNETT & MARTHA S. FELDMAN, RECONSTRUCTING REALITY IN THE COURTROOM: JUSTICE AND JUDGEMENT IN AMERICAN CULTURE 179-80 (1981) (reporting that 63% of sample in one southern county believed that black women have lower morals than white women).

94. *Cf.* People v. Richardson, 363 N.E.2d 924, 926 (Ill. App. Ct. 1977) (prosecutor argued that white man must be telling the truth if he admitted to sex with a black woman).

95. I found only one case in which a prosecutor clearly invoked an image of black people as less intelligent. He said, "Sorry if I used such big words with [the black defendant] like 'spectator' and 'blacky tromp whitey.' Those are awfully big words, I know." People v. Turner, 367 N.E.2d 1365, 1366 (Ill. App. Ct. 1977). In another case, the prosecutor said that the African-American defendant was "stuck, by his own stupidity;" given the barrage of other racial remarks the prosecutor made, it is hard to believe that this remark was race neutral in either effect or intent. Smith v. State, 516 N.E.2d 1055, 1064 (Ind. 1987).

96. *See, e.g.*, DeBrota, *supra* note 5, at 375. *But see* Earle, *supra* note 5, at 1212; *see also* Haynes v. McKendrick, 481 F.2d 152, 153 (2d Cir. 1973) ("This case is surprising in this day and age."); BENNETT L. GERSHMAN, PROSECUTORIAL MISCONDUCT § 10.2(d), at 10-14 (1985) ("Such blatant examples of bigotry rarely occur today, and when they do, the conviction invariably is reversed."); Albert W. Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 TEX. L. REV. 629, 639-640 (1972); Lucinda J. Merrill, *The Limits of Prosecutorial Summation: An Overview of Permissible and Impermissible Final*

perspective is accurate depends, I suppose, on what one considers blatant and what one counts as rare. In my view, most of the reported cases concern blatant appeals to race, although reviewing courts have not always seen it that way.[97] As the examples discussed in the preceding section demonstrate, obvious appeals to racial prejudice can still be found with regular, if not overwhelming, frequency throughout the last twenty years.[98] Some cases are amazing as well as appalling. In one particularly egregious case, the prosecutor's remarks included the following racially inflammatory comments:

> Why is it a black Sunday? Because these two animals decided to shoot white honkies. . . . They were going to shoot white honkies . . . . They were going to go shoot white honkey. What did they mean? They meant business. . . . They left Oakwood Shopping Center, armed themselves and came back to shoot whitey, to kill whitey, and that's exactly what they did. . . . These gentlemen had the opportunity to leave at any time, at any time. Nobody forced them into that shopping center with guns to kill whitey. . . . Ladies and gentlemen, do you think these two black males or any kind of males, these two animals over here."[99]

Such a case can be deemed extreme, but cases that call on an image of black violence and criminality, albeit only once or twice, are not isolated even within the limited arena of prosecutorial comments. Cases in which prosecutors have overtly called on black sexual stereotypes or sexual threat imagery must be deemed fairly common. I count as "blatant" the use of animal imagery in a case involving African-American or Latino defendants. One would expect that prosecutors' comments are the tip of the iceberg because the media, witnesses, defense attorneys, and jurors have far fewer constraints on their behavior.

If reported prosecutorial misconduct cases are merely the

Arguments, 24 S. TEX. L.J. 867, 872 (1983); *cf.* Dennis N. Blaske, *Prosecutorial Misconduct During Closing Argument: The Arts of Knowing When and How to Object and of Avoiding the "Invited Response" Doctrine*, 37 MERCER L. REV. 1033, 1044 (1986) ("Though now more rhetorically sophisticated and less used, [racial appeals] are not uncommon.").

97. *See infra* notes 264-76 and accomapnying text (describig how courts have treated prosecutors' racial appeals).

98. *See, e.g.*, *State v. Lurry*, 395 N.E.2d 1234, 1237-38 (Ill. App. Ct. 1979) (prosecutor argued that defendant wanted to make Joliet like Detroit, where young black males died most frequently by homicide and that an acquittal would encourage "these people" to commit more crimes of violence).

99. *State v. Wilson*, 404 So. 2d 968, 969-70 (La. 1981).

visible tip of the iceberg of the use of blatant racial imagery, then subtle uses of racial imagery are the unexplored Antarctica. Few of the reported cases involve imagery that I would call subtle, but it would be a mistake to infer from the dearth of cases that subtle racial imagery is rarely employed in the courtroom. Rather, the predominance of blatant cases reflects the likely disposition of claims involving more subtle abuses. Unfortunately, courts do not always reverse even blatant cases and virtually never reverse more subtle abuses,[100] thus removing the incentive to litigate the less egregious cases. Indeed, even the number of appeals that do raise a racial imagery claim cannot be accurately ascertained because of the practice of affirming criminal defendants' appeals without an opinion.[101]

The trial of the officers who beat Rodney King provides an example of how both overt and subtle racial images can taint the decision-making process. The relatively blatant use of animal imagery by the officers should not overshadow the more subtle images conveyed by other actors: the demeaning reference to the victim as "Rodney" by a prosecution witness, the insertion of the word "black" in defense counsel's description of what the officers observed, the earlier media reports that Officer Koon thought King moved like a linebacker, or the minority juror's description of the racial tone of deliberations.[102]

Social science data on prejudice and communication supports the hypothesis that the unexplored continent of subtle racial imagery used in court is vast. Social science literature documenting the persistence of negative attitudes toward African Americans is overwhelming.[103] Although there is less data on other minority groups, no one could persuasively claim that

100. *See infra* notes 264-76 and accompanying text (discussing the remedies presently available for improper summations).

101. This practice is extremely common, at least in New York, where I have seen it from the vantage point of the public defender's office. I suspect it also occurs in other states with heavy caseloads. Certainly it was common knowledge at the Criminal Appeals Bureau of the Legal Aid Society in New York City that difficult cases that the courts did not wish to write about were prime candidates for affirmances without opinions. The defense of this practice would be that the impropriety was harmless error in any event, or as public defenders used to say, the GAH ("guilty as hell") rule would apply.

102. *See supra* notes 49-52 and accompanying text.

103. I refer the reader who still needs to be persuaded of the breadth of that literature to easily accessible summaries of the primary literature. *See, e.g.*, Aleinikoff, *supra* note 29, at 1618-51; Johnson, *Black Innocence*, *supra* note 32, at 1618-51; Howard Schuman, *Changing Racial Norms in America*, 30 MICH. Q. REV. 460 (1991); *see also* HOWARD SCHUMAN ET AL., RACIAL ATTITUDES IN AMERICA: TRENDS AND INTERPRETATIONS (1985).

stereotyping has disappeared for them either.[104] "Dominative" racists, persons who express bigotry and hostility openly and often employ physical force, are undoubtedly fewer in number in this country than they were fifty years ago.[105] However, the diminution in the ranks of the openly racist has been neither steady nor an unmitigated blessing. Not only have the last five years brought an upswing in bias-related violence and hate speech, but the long-term trend toward fewer open racists has also been paralleled by a trend toward more closeted, or "aversive" racists.[106] The phenomenon of the modern aversive racist portends frequent resort to subtle racial imagery.

Modern racists do not want to associate with persons of color largely because of the stereotypes they still hold.[107] A 1990 survey by the National Opinion Research Center of the University of Chicago found that more than half of all whites believe that black people are less intelligent, less hard-working, and less patriotic—and more to the point here—more prone to violence than whites.[108] Also relevant is that twenty-five percent of white Americans still approve of antimiscegenation laws.[109] These and similar surveys probably underestimate the prevalence of such stereotypes because such views are socially stigmatized and, therefore, embarrassing to report, even to a pollster.[110] In ordinary conversation, the aversive racist recognizes a formal antidiscrimination norm that forbids openly racist evaluations and conclusions.

Recognition of the antidiscrimination norm does not, how-

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104. *See, e.g.*, HUBERT M. BLALOCK, RACE AND ETHNIC RELATIONS 21 (1982); Jack Lipton, *Racism in the Jury Box: The Hispanic Defendant*, 5 HISPANIC J. BEHAVIORAL SCI. 275 (1983); Tom W. Smith & Glen R. Dempsey, *The Polls: Ethnic Social Distance and Prejudice*, 47 PUB. OPINION Q. 584, 593-94 (1983); Jose L. Solernou, Effects of Ethnic Group Membership an Attribution of Responsibility 58, 72 (1977) (unpublished dissertation, University of Kentucky).

105. *See* Johnson, *Unconscious Racism*, *supra* note 32, at 1027-28 (surveying the relevant literature).

106. *Id.*

107. TEUN A. VAN DIJK, COMMUNICATING RACISM: ETHNIC PREJUDICE IN THOUGHT AND TALK 224-26 (1987).

108. Aleinikoff, *supra* note 29, at 332.

109. *Id.* at 332 n.21.

110. *See* Harold Sigall & Richard Page, *Current Stereotypes: A Little Fading, A Little Faking*, 18 J. PERSONALITY & SOC. PSYCHOL. 247, 254 (1971) (reporting results of experiment that revealed that more negative attitudes toward black people are reported when the subject thinks the experimenter has a physiological basis for determining whether the subject is being truthful); *see also* Deborah A. Byrnes, *Contemporary Measures of Attitudes Toward Blacks*, 48 EDUC. & PSYCHOL. MEASUREMENT 107 (1988) (attempting to devise scales for measuring racial attitudes masked by rationalization).

ever, prevent the telling of racial stories or the conveying of racial imagery. In a fascinating linguistic study of white conversations about minorities in the United States and Holland, Teun A. Van Dijk observed a variety of recurring speech patterns.[111] Racial stories are generally not "I" stories, but "we" stories; group membership is signalled often by reference to group goals.[112] The stories are most successful when the self can be identified as a victim, both because it is more persuasive and because it allows the whole group to see itself as a victim entitled to the negative feelings it has about a racial outgroup.[113] The telling and hearing of these stories is thus functional for the majority and, despite the antidiscrimination norm, occurs quite frequently. The formal norm, particularly in settings where the racial views of the audience are unknown, makes direct attribution of negative personality characteristics to a race risky and, therefore, relatively rare; politeness and indirection function to preserve the positive presentation of self.[114]

Racist evaluations and conclusions are often toned down through various semantic moves. Negative acts are often described with the racist conclusion left implicit.[115] Thus, it is not surprising that in cases involving sexual threat imagery the argument that miscegenation is wrong is not made; it is enough, and safer, to merely tell the jury about the defendant's interracial sexual activity. Examples and generalizations are also common;[116] hence, the Willie Horton ads[117] and prosecutorial reminders of the prevalence of "black on black" crime. Again, overt arguments of racial propensity are not necessary.

Denial of racist motives is another common semantic tactic,[118] with racial remarks prefaced by "I am not a racist, but

111. VAN DIJK, *supra* note 107, at 48.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* at 90-91.

117. In the 1988 presidential campaign, a campaign commercial supporting George Bush pictured Horton, a black man convicted of raping a white woman while on a prison furlough approved by Governor Dukakis, Vice President Bush's opponent. In the 1992 campaign, greater subtlety was possible; given the history of the Horton ad and the controversy it caused, the President invoked the image of Horton without even using his name by suggesting that "some guy let out of jail too early" could threaten the citizens of Governor Bill Clinton's Arkansas. *See Clinton Crime Policy Questioned*, UPI, Sept. 23, 1992, *available in* LEXIS, Nexis Library, UPI File.

118. VAN DIJK, *supra* note 107, at 91-92.

. . . ."[119] Here, one cannot help but think of the radio operator's denial during the Rodney King beating trial that the "gorillas in the mist" conversation related to race—and the jurors' apparent acceptance of that denial.[120] Closely related to denial is apparent concession, where a positive remark is coupled with a negative one ("I like them a lot, but . . . ." and "white people do that too, but . . . .").[121] Mitigation, where the speaker understates her negative views, is also similar; the minimizing adjective undercuts the negative characterization ("I think its a *little* strange that they . . . .").[122]

Negative impressions are also managed through the use of a hypothesized explanation or purported ignorance.[123] Thus, after describing a negative trait or incident, the speaker may ascribe it to cultural difference or note that she does not know why a person would behave in that way, thereby hoping to avoid the inference that she thinks such traits are genetically predetermined.

Prejudiced talk often includes contrasts between the majority group and the disliked minority. Contrast may, however, be stated in very vague terms with nonverbal cues such as pitch, intonation, and facial expression conveying the opinion of the speaker about the ethnic outgroup. Prejudiced talk often uses pronouns of distance. "They," "them," "those people," and similar euphemisms emphasize separation while protecting the speaker from the risk of social disapproval that accompanies overt racial pronouncements.[124] A paradigmatic example here would be Patrick Buchanan's statement about the post-King verdict rioters: "They violated our laws."[125] We all know who

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119. For a particularly arrogant variation on the denial move, see Roger Parloff, *Maybe the Jury Was Right*, AM. LAW, June 9, 1992, § 2, at 7. Regarding his view that the jury in the King case acted properly, he asks, "Am I out of my mind? A fascist? A racist? (I'm white.)." The rest of the article makes clear that this is not self-searching, but a purely rhetorical question; the answer is supposed to be obvious.

120. When they debated a computer message in which Officer Powell called a black family dispute "right out of Gorillas in the Mist," one juror argued that he could have been describing a closely knit family. Richard Prince, *King Jurors Should Read Police Memoirs*, Gannett News Service, May 22, 1992, *available in* LEXIS, Nexis Library, GNS File.

121. VAN DIJK, *supra* note 107, at 93-95.

122. *Id.* at 95-97.

123. *Id.* at 92-93, 97-98.

124. *Id.* at 104.

125. Buchanan toured Koreatown after the riots. *Primaries Take Backseat to Los Angeles Riots, Proprietary* to UPI, May 4, 1992, *available in* LEXIS, Nexis Library, UPI File. One of my students, who was there, reported this comment. Buchanan has said similar things that have been reported in the press. *See*, e.g., *Government Failed in Its First Duty in Los Angeles, Buchanan Says, Proprietary* to UPI, May 19, 1992, *available in*

"they" are; we all know who "we" are. It seems unlikely that such a statement would be made about Charles Keating and his friends after the Lincoln Savings and Loan debacle. "They violated our laws" on its surface has no racial referents that are easily criticized, but the racial message is inescapable. Jurors who hear such messages may be tainted before the defendants they will judge have even been indicted.

II. THE REGULATION OF RACIAL BIAS IN CRIMINAL CASES

Although variation in the source, subtlety, and specific content of racial imagery provides opportunities to reinforce racial animus and stereotyping once it has been introduced into a criminal trial, sharp doctrinal lines often obscure the common roots and cumulative effects of these varied forms. Unfortunately, it is easy to parse the racial imagery in a case into categories and conclude that each piece fails to meet the mistrial (or reversal) standard for the relevant category.

To again use the Rodney King beating case as an example, variation in all three dimensions—source, subtlety, and specific content of the imagery—may be observed, but there exists no doctrinal paradigm for assessing the cumulative effects of multiple racist manipulations of the jury. Bias is first divided by its source and setting. Thus, pretrial bias introduced by the media may be deemed "solved" by a change of venue. Consequently, there will be no consideration of how racial imagery plays a different (indeed, opposite) role in the new venue[126] and how *that* pretrial prejudice may be reinforced by the imagery invoked at the trial. Second, the more subtle invocations of racial imagery are unlikely to be interpreted in light of more blatant abuses; even if the blatant use of animal imagery by Officers Koon and Powell would have been condemned, Powell's attorney would probably not have been criticized for his unnecessary parenthetical "a black man"—a more subtle remark that gains its power from what came before. Finally, the subhuman imagery of Powell's and Koon's statements may never be connected with the

LEXIS, Nexis Library, UPI File ("As they took back the steets of Los Angeles, block by block, so we must take back our cities, and take back our culture, and take back our country.").

126. Nor will there be consideration of what effect the change of venue decision itself has. One might hypothesize that some potential jurors in Simi Valley might find the change of venue confirmation of their prior suspicions that people of color cannot be trusted to make judgments in a case of this kind.

black-as-evil imagery suggested by the juror's statement: "He deserved what he got."[127]

The only conceivable legal vehicle for measuring the cumulative impact of racial imagery is an argument that the trial as a whole deprived the defendant of due process. That I have not found a case in which such an argument was discussed[128] suggests something of its likely success.[129] Moreover, even this hypothetical argument would be possible only when the racial bias was anti-defendant, given that the Due Process Clause has not been interpreted to speak to deprivations suffered by victims, witnesses, or the general public.

Because there is no mechanism for assessing the cumulative effects of racial imagery that provide the remedy of mistrial or appellate reversal,[130] stringent regulation of each instance of the introdution of racial imagery becomes crucial. Unfortunately, there is no clear standard for determining when the introduction of racially tinged images is permissible. Instead, regulation of that imagery is dependent on the application of several generic standards, each aimed at regulating various kinds of bias in a particular setting. Thus, racial imagery may be evaluated against the various standards for pretrial prejudice, the admissibility of relevant evidence, the limits on proper summations, and so on, depending on who introduces the imagery and at what point in the proceedings it is introduced.

Before rape shield laws were enacted, introduction of prejudicial images of the "kind" of woman who consents, or the "kind" of woman who deserves to be raped, were governed only by the same general rules that presently constitute the only protection against the introduction of racially tinged language and imagery. The ineffectiveness of those general rules is by now well known in the context of rape prosecutions. A review of

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127. *See* Kelner & Kelner, *supra* note 3, at 3.

128. *Cf.* State v. Parker, 509 P.2d 272, 274 (N.M. Ct. App. 1973) (defense failed to object to racial references; however, assuming arguendo the defendant's right to argue cumulative error, the challenged references to the defendant living with a white woman and the references to black people as "colored" were not objectionable as a matter of law).

129. The closest contenders are very old cases. *See, e.g.*, Moore v. Dempsey, 261 U.S. 86 (1923) (mob domination of trial violates due process).

130. Mistrial is the only conceivable remedy in a situation like the Rodney King beating case where the bias generated is pro-defendant because the Double Jeopardy Clause of the United States Constitution forbids retrial after an acquittal. U.S. CONST. amend. V, § 2.

their application to the problem of racial imagery will show them to be equally inadequate here for similar reasons.

A. Legal Devices for Defusing Pretrial Racial Imagery

As discussed in Part I, the effect of racial imagery on deliberations may have pretrial origins, either in publicized media descriptions of the contested events or the jurors' individual experiences. A change of venue is supposed to remedy the former and voir dire the latter. Neither precaution is adequate.

When a "pattern of deep and bitter prejudice [is] shown to be present throughout the community," a change of venue is required.[131] Recent Supreme Court cases have established that this standard is quite difficult to meet,[132] but occasionally failure to grant a change of venue results in a reversal,[133] and occasionally a change of venue is granted by the trial judge. However, most changes of venue simply take the trial, for convenience reasons, to neighboring counties and jurors in the neighboring county are often also exposed to pretrial publicity concerning the case. Often the neighboring counties will have similar prejudices, albeit at slighly lower levels.[134] Thus, in the Joan Little case, where a black woman prisoner was prosecuted for killing a white jailer who allegedly raped her, the change of venue was to a neighboring county where "only" thirty-five percent of the population believed black women had lower morals than white women and that black people were more violent than white people.[135]

Sometimes, as in the King beating case, the neighboring county has a different reaction to the pretrial imagery—not necessarily a better one, however.[136] Jurors in neighboring Simi

131. Irvin v. Dowd, 366 U.S. 717, 727 (1961).

132. *See, e.g.*, Patton v. Yount, 467 U.S. 1025 (1984).

133. *See, e.g.*, Lozano v. State, 584 So. 2d 19 (Fla. Dist. Ct. App. 1991), *review denied*, 595 So. 2d 558 (Fla. 1992).

134. Hines v. State, 384 So. 2d 1171, 1183-84 (Ala. Crim. App.), *cert. denied*, 384 So. 2d 1184 (Ala. 1980).

135. In the county in which the killing occurred, 63% of the sample agreed that black women have lower morals than white women and that blacks are more violent than whites. Little was acquitted despite these attitudes. BENNETT & FELDMAN, *supra* note 93, at 179-80.

136. After Powell's conviction on federal charges, the remaining state court charge of using excessive force under color of law, on which the first state jury had been hung, was dismissed. *Judge Dismisses Remaining King Beating Charges*, UPI, Apr. 28, 1993, *available in* LEXIS, Nexis Library, UPI File. However, prior to the dismissal of those charges, a judge had decided that any subsequent state trial would take place in Los Angeles. Lou

Valley had heard much of the pretrial publicity that presumably would have biased a Los Angeles jury, but filtered it through the lens of their quite different prior experience. In response to the Simi Valley verdict, legislators in California and New Jersey are drafting bills that would require any change of venue to be to a site demographically similar to the original location.[137] However, this is not a panacea or even a particularly good idea. In many situations, this requirement would simply reproduce the prejudice of an all-white original venue. In other situations, it may not be possible to duplicate the original location's venue in all racially relevant ways. In Florida, Judge W. Thomas Spencer first moved from Orlando to Tallahassee the upcoming retrial of a Latino police officer charged with fatally shooting a black motorcyclist. He cited the King verdict and the much greater black population of Tallahassee as reasons for his decision. But as the defendant's attorney then pointed out, the Latino population in Tallahassee is less than three percent in contrast to a Latino population of almost ten percent in Orlando. By protecting the victims from racial prejudice, the judge, in effect, was exposing the defendant to racial prejudice. The trial was moved five times before it finally began in Orlando, where a jury acquitted the defendant.[138]

The best that can be said of a change of venue is that while it cannot solve all extraordinary pretrial imagery problems, it might ameliorate them in a small number of cases if it were employed often. Voir dire, aimed at the individual jurors' biases rather than community biases, does not do much better.

The racial images that a juror carries in her head are rarely revealed by voir dire. This is in part because voir dire on racial issues is not always permitted, even when inflammatory factual circumstances are present. In *Ristaino v. Ross*,[139] a truly outrageous decision, the Supreme Court held that the trial of a black man for violent crimes against a white man "did not suggest a significant likelihood that racial prejudice might infect [the] trial," and therefore due process did not require a question on racial prejudice.[140] Very few states have recognized a require-

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Cannon, *No Venue Change in Officers' Retrial; Ruling Seen as Victory for Prosecution*, HOUS. CHRON., May 23, 1992, at A3.

137. *See id.*

138. *Lozano Attorney's Words Come from Poet*, UPI, May 31, 1993, *available in* LEXIS, Nexis Library, UPI File.

139. 424 U.S. 589 (1976).

140. *Id.* at 598. In Turner v. Murray, 476 U.S. 28 (1986), the Court reaffirmed *Ris-*

ment of voir dire on racial prejudice, and most do not recognize such a right even under inflammatory factual circumstances.[141]

Even when trial courts permit inquiry concerning racial prejudice, questions are often limited in number and sometimes they are addressed to the entire venire rather than individual jurors.[142] Attorneys who have been permitted to conduct extensive voir dire report that prospective jurors reveal racial prejudice only after numerous sensitive and specific questions have been asked.[143] In part, this is because most modern racists do not have categorically hostile attitudes toward minorities and, therefore, general questions will not probe inconsistencies. A juror may sincerely answer that she has no bias against black people that would impair her partiality, while still believing that interracial marriage is wrong and that black people are more violent than white people. Moreover, even extensive questioning, which is rare, is unlikely to eliminate all persons whose deliberations will be influenced by racial imagery. Accordingly, the formal norm of equality renders the admission of racially prejudicial views socially stigmatizing and encourages dishonest proclamations of nonracist views.

B. Evidentiary Rules Restricting Racial Imagery in Testimony

If we must acknowledge that we cannot prevent jurors from walking into the jury box with racial imagery already in their heads, it would be nice to believe that the trial process will not underline preexisting images or introduce new ones. Certainly with regard to racial imagery coming from witnesses, this is a vain wish.

Federal Rule of Evidence 402 and the corresponding state rules adopt two axioms of the common law: relevant evidence is generally admissible, absent a reason to exclude it, and irrelevant

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taino, but added a bizarre distinction for death penalty cases. Voir dire on racial prejudice is required at a capital sentencing proceeding for an interracially violent crime—but not at the trial for the underlying offense. As Justice Brennan asked in dissent: "Does the Court really mean to suggest that the constitutional entitlement to an impartial jury attaches only at the sentencing phase? Does the Court really believe that racial biases are turned on and off in the course of one criminal prosecution?" *Id.* at 43 (Brennan, J., dissenting).

141. *See* Johnson, *Black Innocence*, *supra* note 32, at 1672-74 (reviewing the cases).

142. *Id.* at 1674.

143. *See, e.g.*, Ann F. Ginger, *What Can Be Done to Minimize Racism in Jury Trials?*, 20 J. PUB. L. 427, 434-38 (1971); *see also* NATIONAL JURY PROJECT, JURYWORK § 10.03[4] (1983); *cf.* Mark Soler, *"A Woman's Place . . .": Combatting Sex-Based Prejudice in Jury Trials Through Voir Dire*, 15 SANTA CLARA L. REV. 535 (1975).

evidence is invariably inadmissible.[144] In order for evidence to be relevant it must be material to an issue in the case and probative of that issue. Accordingly, when racial imagery is not probative of a disputed issue, it should be excluded for that reason. In fact, irrelevant racial questions are frequently asked and occasionally answered. When questions are asked—whether they are answered or the objection to them is sustained—the jury has heard inflammatory information for no legitimate reason. On conviction and appeal, courts respond in an uneven fashion. When a witness is asked for irrelevant facts concerning a black male defendant's sexual relationship with a white woman *and* the witness has been permitted to respond, the resulting conviction will usually be reversed on appeal.[145] Even here courts differ; a Tennessee state court upheld a conviction (ultimately reversed by the Sixth Circuit) where the prosecutor had been permitted to ask the black defendant whether the woman he said he had been with was white, whether he was the father of her child, and whether he had had intercourse with her the morning of the homicide.[146] When such a question has been asked, but the trial court sustains an objection and instructs the jury to disregard it, most courts do not reverse the conviction.[147]

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144. FED. R. EVID. 402; KENNETH S. BROWN ET AL., MCCORMICK ON EVIDENCE 540-41 (Edward W. Cleary ed., 3d ed. 1984).

145. *See* Johnson v. Rose, 546 F.2d 678, 678 (6th Cir. 1976) (prosecutor permitted to ask black defendant whether he had had sex with a white woman the morning of the crime); Robinson v. State, 520 So. 2d 1, 6 (Fla. 1988) (psychiatrist questioned about whether defendant's other victims were white women); People v. Springs, 300 N.W.2d 315, 318 (Mich. Ct. App. 1980) (witnesses were asked about the race of prostitutes working for the black defendant, whether many white girls frequented defendant's disco, and about the race of the men who sought the defendant's prostitutes); *see also* United States v. Grey, 422 F.2d 1043, 1045 (6th Cir. 1970) (prosecutor asked black defendant's character witness if he knew defendant was "running around with a white go-go dancer"; however, it is unclear whether answer was permitted).

146. Johnson v. Rose, 546 F.2d 678, 678 (6th Cir. 1976); *see also* State v. Parker, 509 P.2d 272, 273 (N.M. Ct. App. 1973) (court said it did not condone question regarding race of defendant's wife, but question did not constitute fundamental error).

147. *See, e.g.*, Roberson v. State, 276 S.E.2d 114, 115 (Ga. Ct. App. 1981) (in a robbery case, appellant's brother was asked: "Back before you got committed for this pimping conviction you were out selling the services of white women; weren't you?"); State v. Bell, 209 S.E.2d 890, 892 (S.C. 1974) (defendant asked if he remembered his first date "with this white lady?"), *cert. denied*, 420 U.S. 1008 (1975); State v. Weaver, 386 S.E.2d 496, 498 n.3 (W.Va. 1989) ("I believe your wife is white, isn't she?"); *see also* State v. Monsees, 301 So. 2d 109, 110 (Fla. Dist. Ct. App. 1974) (white female defendant was asked: "There wasn't a black man with you in the store?"). *But see* Weddington v. State, 545 A.2d 607, 610-15 (Del. 1988) (reversing conviction of defendant who had been asked about his desire to see some "loose white women," despite trial court's instruction to jury to disregard the question).

Reversal is even harder to obtain when the irrelevant question does not relate to interracial sex. Even an overruled objection to irrelevant testimony that is racially tinged in a nonsexual way may not result in a reversal.[148] Thus, a New York court held that references to the race of an arresting police officer and an informant during a witness's direct testimony and in the prosecutor's summation did not constitute such a "thematic reference to . . . race" that reversal was mandated.[149] Additionally, a Louisiana court agreed that whether the hotel frequented by the defendant was "predominantly black" was irrelevant, but did not reverse the conviction of a defendant whose witness had been required to answer that question.[150] Finally, a question asked of the defendant on cross-examination concerning whether the store at which he worked was owned by persons from the Dominican Republic was held not to deny the defendant a fair trial because the disputed references on cross-examination and in summation were not "numerous."[151] There are only two cases addressing irrelevant, nonsexual racial imagery in which objections to the questions were sustained and the jury was instructed to disregard them,[152] and in both the convictions were affirmed.[153]

148. For reversals, see Eiler v. State, 492 A.2d 1320 (Md. Ct. Spec. App. 1985) (white defendant asked for his characterization of black people as "spades" and a black neighborhood as "Spade City"); Commonwealth v. Mahdi, 448 N.E.2d 704, 711-12 (Mass. 1983) (defendant was asked many questions about the racial tenets of the Muslim religion); *see also* People v. Criscione, 177 Cal. Rptr. 899, 904 (Ct. App. 1981) (asking defendant's brother whether in a typical Italian family the "father is an ogre and the mother is a dominant overbearing person"); State v. Kaufman, 278 So. 2d 86, 96-98 (La. 1973), *cert. denied*, 429 U.S. 981 (1976) (reversing conviction when black defendant's common-law wife was asked about her comment about "honkies" and another witness was asked repeatedly whether a remark about "honkies" had been made); Commonwealth v. Tirado, 375 A.2d 336, 337-38 (Pa. 1977) (police officer testified as to Puerto Rican pride and machismo).

149. People v. Ali, 551 N.Y.S.2d 54, 55 (App. Div. 1990), (prosecutor's references to race of police officer and informant did not warrant reversal) *appeal denied*, 559 N.E.2d 683 (N.Y. 1990); *see also* People v. Bramlett, 569 N.E.2d 1139, 1145-46 (Ill. App. Ct.) (prosecutor asked without objection why black officer would falsely accuse a black defendant, arguing over objection that he would not), *appeal denied*, 580 N.E.2d 121 (Ill. 1991).

150. State v. Tatum, 506 So. 2d 584, 588-89 (La. Ct. App. 4th Cir. 1987).

151. People v. Espinal, 572 N.Y.S.2d 334, 335 (App. Div.), *appeal denied*, 581 N.E.2d 1065 (N.Y. 1991).

152. *Cf.* United States v. Haynes, 466 F.2d 1260, 1264-67 (5th Cir. 1972) (reversal where prosecutor's line of irrelevant questioning of defendant culminated in his statement "burn, baby burn" and judge sustained objection to remark, but did not admonish the prosecutor or instruct the jury).

153. Stanton v. State, 349 So. 2d 761, 764 n.1 (Fla. Dist. Ct. App. 1977) (affirming conviction in which prosecutor asked defendant, "Isn't it true in gypsy practice that it is Okay to lie and cheat and steal if you can get away with it?"); State v. Monsees, 301 So. 2d

Even if evidence is relevant, Rule 403 of the Federal and Revised Uniform Evidence Rules, codifying the common law, provide that such evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice."[154] One might expect to see numerous cases involving racial imagery litigated under the prejudice rules, simply because of the breadth of what is deemed relevant. For example, the characterizations by Officers Koon and Powell are clearly relevant; what the officers observed and how they interpreted King's behavior has probative value on the issue of whether their response constituted excessive force. Therefore, the question is whether the probative value of the phrasing of those characterizations outweighs the danger of provoking racial prejudice. Similarly, when a racial incident or motive may be hypothesized as the cause of a crime or the report of a crime, evidence of that incident or motive is relevant, but it still might be inadmissible as more prejudicial than probative. Additionally, some racially charged event may coincidentally occur during the course of a criminal escapade; however, because "considerable leeway is allowed even on direct examination for proof of facts that do not bear directly on the purely legal issues, but merely fill in the background of the narrative and give it interest, color, and lifelikeness,"[155] this testimony would be inadmissible only if it were prejudicial.

Nevertheless, relatively few cases address whether the prejudicial effect of testimony that conveys a racial image outweighs its probative value. In one case, the prosecutor elicited testimony as to the obscenities uttered by the defendant, which included a remark to the effect that the witness was having sexual relations with "n*****s."[156] The appellate court, noting that two jurors were black, found a curative instruction by the judge insufficient to remove the prejudice that had been injected into the trial by the remark.[157] But in another case, when the insult at issue was "honkey," the reviewing court showed less solicitude and did not even discuss the possibility of prejudice inherent in the third-hand repetition of the defendant's use of a racial

109, 110 (Fla. Dist. Ct. App. 1974) (reversing grant of mistrial after verdict was rendered because of prosecutor's question to a white female defendant, "There wasn't a black man with you in the store?").

154. FED. R. EVID., BROWN ET AL., *supra* note 144, at 544-45.

155. BROWN ET AL., *supra* note 144, at 541.

156. McBride v. State, 338 So. 2d 567, 568-69 (Fla. Dist. Ct. App. 1976).

157. *Id.*

slur. Instead, the court confined its opinion to the impropriety of eliciting hearsay.[158] In the two cases where black-as-criminal imagery appears in the testimony, both reviewing courts found it reversible error to have admitted evidence they considered relevant, or arguably relevant, when that testimony had significant prejudicial impact. In one case with a Jamaican defendant, the D.C. Circuit found error in the admission of expert testimony on the role Jamaicans play in the local drug market and how they run their drug operations.[159] In the other case, the First Circuit found error in the admission of an ID card showing the defendant to be Colombian when other members of the conspiracy were known to be Colombian.[160] Another federal court found that evidence of racial motives for the killings (which I have categorized as employing "us-them" imagery) should not have been admitted absent any link between that evidence and the defendant, other than his race, because the danger of prejudice outweighed the probative value.[161]

However, it must be noted that New Jersey reviewing courts had found the evidence of racial motive admissible;[162] therefore, had the defendant been unable to secure counsel for habeas corpus, to which there is no constitutional right,[163] no reversal would have ensued. Moreoever, in another state case, the reviewing court deemed questions about the race of the victims ("black") and their sexuality ("either prostitutes or effeminate") relevant to sanity as it showed whether the defendant was exhibiting an organized pattern of behavior. The court did not even attempt to balance prejudice and probative value, but simply concluded that the questions were not *designed* to inject prejudice.[164] Finally, in a state rape case where the witness was

158. Dixon v. State, 325 S.E.2d 893, 895-96 (Ga. Ct. App. 1985); *see* United States v. Brown, 720 F.2d 1059, 1064 (9th Cir. 1983) (not directly addressing prejudice-probative value of defendant's prior statement, "I sell dope to honkies and white bitches and whores," but finding admission of his remarks a violation of *Miranda* and finding prejudice due to the inflammatory nature of the police officer's precipitating remarks).

159. *See* United States v. Doe, 903 F.2d 16, 21-23 (D.C. Cir. 1990).

160. *See* United States v. Rodriguez Cortes, 949 F.2d 532, 540-43 (1st Cir. 1991).

161. *See* Carter v. Rafferty, 621 F. Supp. 533, 538-47 (D.N.J. 1985), *cert. denied*, 484 U.S. 1011 (1988).

162. *See* State v. Carter, 449 A.2d 1280, 1288-92 (N.J. 1982).

163. Pennsylvania v. Finley, 481 U.S. 551 (1987); *see* Murray v. Giarratano, 492 U.S. 1 (1989) (even indigent death row inmates who lack counsel need not be provided with counsel at state expense).

164. *See* People v. Anderson, 421 N.W.2d 200, 208 (Mich. Ct. App. 1988), *appeal denied*, 432 Mich. 858 (1989).

asked if the "Mexican-American" defendant had told him he had never had sex with a white girl before and was going to go over to the apartment that day to have sex with a white girl, the trial court sustained the objection.[165] However, the appellate court found the statement relevant as evidence of the defendant's intent and concluded that "evidence, admissible for one purpose, should not be excluded only because it is prejudicial."[166]

As with any balancing inquiry, these cases are a mixed bag, but one with a decided slant toward admissibility. All but one of them involve testimony actually admitted rather than images posed in a question to which an objection was sustained. Some of the evidence is arguably not even relevant, although it is presumed so. In this context, several courts do not even undertake a balance between probative value and prejudice.

Thus, whether we are talking about irrelevant or relevant but prejudicial evidence, to the extent appellate cases reflect the world of trials, protection from evidence or insinuation of evidence with racial imagery is sporadic at best. The informed prosecutor will know that asking a question invoking nonsexual racial imagery will probably be costless. If defense counsel objects and the court sustains the objection, the imagery has been presented and a mistrial need not be declared to vouchsafe the conviction; if counsel fails to object, the issue will not be preserved for appeal; and even if there is an objection that the court overrules, there is still a good chance that the conviction will be affirmed. Moreover, there are two reasons to believe that the situation in the trial world is substantially bleaker than the reported cases indicate. First, there are no recent cases even addressing "volunteered" racial imagery, such as witness characterization of a person of color as animal-like. Spontaneity, or rehearsed spontaneity, is apparently a complete defense in appellate review. Second, the cases reflect only the behavior of prosecutors. Accordingly, injustices caused by defense attorney proffers of racially charged testimony are likely more numerous, both because there are no reversals of acquittals and because, counting on that fact, defense attorneys can act more egregiously. Is it a surprise then that the prosecutor did not object to the animal imagery "volunteered" by the defendants in the King beating case? An objection calls more attention to the testimony

165. *See* State v. Maldonado, 675 P.2d 735, 737 (Ariz. Ct. App. 1983).

166. *Id.*

even if sustained, which it might well not be.[167] Commentators, quick to second-guess other decisions of the prosecutor in this case, have not criticized this one.

C. Due Process and Other Legal Constraints on Prosecutorial Summation

Both prosecutors and defense counsel are theoretically constrained in summation by statutory requirements that prohibit arguing facts not in the record or appealing to the prejudice of jurors. But with respect to defense counsels' remarks, the prohibition against appeals from acquittals means that the failure of a trial judge to restrain improprieties has no remedy; it also means that trial judges have little or no guidance as to which remarks by defense counsel should be restricted. Prosecutors' arguments may be reviewed under statutory constraints, but are more often evaluated under the Due Process Clause although, occasionally it will be unclear whether the "fundamental fairness" the court is assessing stems from the Due Process Clause or some other source. After reviewing the due process-fundamental fairness cases in some detail, I will briefly address the two cases applying equal protection constraints to a prosecutor's use of racial imagery and, finally, the one statute that directly regulates prosecutorial references to race.

What is most striking is the large number of affirmances in cases where the prosecutor has employed racial imagery in her summation. There is a passel of reasons for these affirmances. First come the cases in which an instruction to disregard the prosecutor's comments is deemed to have cured the error.[168] In these cases, it is as though racial prejudice can only be stirred up with the judge's permission. Thus, for example, in a robbery prosecution of a Vietnamese defendant, the prosecutor's reference to roving gangs of gunmen committing hold-ups in Vietnam was deemed not so offensive and prejudicial that it constituted fundamental error, given the sustained objection.[169] The

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167. *Cf.* United States v. Haynes, 466 F.2d 1260, 1265 (5th Cir. 1972) (judge and defense counsel thought that admonition to disregard inflammatory statement would be counterproductive).

168. *See, e.g.*, United States v. Pena, 793 F.2d 486, 490-91 (2d Cir. 1986); Nquyen v. State, 547 So. 2d 582 (Ala. Crim. App. 1988); People v. Flores, 398 N.E.2d 1132, 1136 (Ill. App. Ct. 1979); Herring v. State, 522 So. 2d 745, 746-48 (Miss. 1988); State v. Martinez, 658 P.2d 428, 430-31 (N.M. 1983); People v. Dupree, 487 N.Y.S.2d 847, 849 (App. Div. 1985).

169. *Nquyen*, 547 So. 2d at 589-90.

use of an ethnic slur has also been deemed cured by a reprimand.[170]

More surprisingly, inferences from the jury's observable behavior have provided sufficient assurance that a disputed verdict need not be reversed. In one instance the appellate court relied on the trial court's purported observation of the jury's adverse reaction to the prosecutor's racial argument;[171] in another, on the jury's request to review testimony and receive additional instructions;[172] and in a third, on the fact that the jury was composed of eight black persons who did not vote for the life sentence the prosecutor had urged.[173] Again, a false supposition underlies these cases. This time it is a misunderstanding of modern racism; a jury may disapprove of openly racist statements, it may rationally attempt to balance the evidence, and it may not blindly swallow everything said—but that only indicates that the jurors are not overtly racist and not whether they may be influenced by racial imagery.[174]

Another common reason for failing to reverse for racial imagery is that the defendant or her counsel invited or sanctioned the imagery.[175] At least two of these cases require real stretching. In one case, the reference to the defendant's Colombian origins in the prosecutor's opening statement was held to be nonprejudicial, given defense counsel's reference to the defendant's origins in his closing statement.[176] In the other case, the fact that both the prosecutor and the defense attorney had made numerous references to the complaining witness in a rape case as a "white woman" or "white lady" was said to mitigate an overruled objection to the prosecutor's argument that if the jury believed the complainant they would have to believe that the black defendant "took it, he got him a white woman."[177] More broadly, the problem with relying on defense counsel "invita-

170. *See, e.g.*, *Martinez*, 658 P.2d at 430-31 ("chola punk").

171. *See* People v. Dukett, 308 N.E.2d 590, 596-97 (Ill.), *cert. denied*, 419 U.S. 965 (1974).

172. People v. Rivera, 426 N.Y.S.2d 785 (App. Div. 1980).

173. *See* Herring v. State, 522 So. 2d 745, 746-48 (Miss. 1988).

174. *See generally* Patricia G. Devine, *Stereotypes and Prejudice: Their Automatic and Controlled Components*, 56 J. PERSONALITY & SOC. PSYCHOL. 5 (1989).

175. *See, e.g.*, United States v. Cardenas, 778 F.2d 1127, 1131 (5th Cir. 1985); United States v. Yonn, 702 F.2d 1341, 1349 (11th Cir.), *cert. denied*, 464 U.S. 917 (1983); Rhoden v. State, 274 So. 2d 630, 635 (Ala. Crim. App. 1973); Commonwealth v. Lopez, 530 N.E.2d 1247, 1250-51 (Mass. App. Ct. 1988).

176. *Cardenas*, 778 F.2d at 1131.

177. *Rhoden*, 274 So. 2d at 635.

tions" ignores that defense counsel too may be racist, that references to race not intended to provoke prejudice may nevertheless do so, and that references to race may be cumulative in their impact.

Then there are the cases that rely on defense counsel's failure to object to sustain the conviction. That failure to object should require a higher level of misconduct—"plain error," "manifest necessity," or its equivalent—is not surprising,[178] but what is not considered plain error is not surprising, but, to be blunt, itself racist. The following have been held *not* to be plain error: characterization of the defendant as a "n*****";[179] falsely attributing the epithet "honkey" to a black defendant;[180] arguing that the defendant's Middle Eastern background made him more likely to be greedy and not content to make money from a gas station;[181] arguing about the need to control individuals who support corrupt governments in Colombia, where cocaine is grown;[182] arguing that "no person in their right mind would want to remember three black men getting on her naked body;"[183] arguing that it was not believable that the defendant had not entered the robbed premises because it was incredible that the codefendant would leave "a black guy out there in a car . . . while a robbery is going on";[184] arguing that because a white woman had lived with a black man for two years, she had already faced a lot of social disapproval and therefore would be more likely to lie for him;[185] telling the jury in a death penalty

178. There may be some racial remarks that arguably should not be reversed absent an objection. A single bald reference to the race of the defendant or victim might fall into this category. *See, e.g.*, People v. Johnson, 499 N.E.2d 1355, 1368 (Ill. 1986) ("black man"), *cert. denied*, 480 U.S. 951 (1987). Even that depends on the context. As I have argued earlier, that type of reference in the King beating case was not trivial, given the pervasive racial imagery in the case. To take another example, in Sanders v. State, 428 N.E.2d 23, 28 (Ind. 1981), where the prosecutor alluded to "a black kid from Detroit" in his opening statement, the court's determination that its admission was not reversible error absent an objection may be correct. Still, one has to wonder about the extra baggage that "from Detroit" carries.

179. Thornton v. Beto, 470 F.2d 657, 659 (5th Cir. 1972) (not prejudicial after objection and jury admonition).

180. United States v. Harvey, 756 F.2d 636, 649 (8th Cir.), *cert. denied*, 474 U.S. 831 (1985).

181. People v. Marji, 447 N.W.2d 835, 841-43 (Mich. Ct. App. 1989), *appeal denied*, No. C6947-8, 1991 Mich. LEXIS 434 (Mich. 1991).

182. Killings v. State, 583 So. 2d 732, 732-33 (Fla. Dist. Ct. App. 1991).

183. State v. Mayhue, 653 S.W.2d 227, 237 (Mo. Ct. App. 1983) (emphasis omitted).

184. State v. Snowden, 675 P.2d 289, 293 (Ariz. Ct. App. 1983).

185. State v. Terry, 582 S.W.2d 337, 339 (Mo. Ct. App. 1979) (after objection and jury admonition).

hearing opening statement that a detective would testify that the defendant's two prior victims, like the victim in the case being tried, were young white women who had been sexually assaulted by the defendant;[186] arguments making repeated references to the defendant's race;[187] and questioning, "Can you imagine her state of mind when she woke up at 6 o'clock that morning, staring into the muzzle of a gun held by this black man?"[188]

The next obstacle to reversal is the harmless error doctrine. While one court has held that the harmless error doctrine does not apply to racially inflammatory summations[189] and some commentators have agreed,[190] most courts do not make such an exception.[191] On finding overwhelming evidence of guilt, courts usually affirm the conviction, despite remarks they deem patently improper, on the supposition that any error is harmless.[192]

After the procedural hurdles to reversal come a variety of reasons relating to the content of what was said. Probably the most frequent reason for minimizing—or taking seriously—the offense is a reference to the prosecutor's supposed intent. It was not "race-baiting" to ask the jury to imagine the fear of the victim as a prisoner of three black strangers;[193] the repeated references to the black defendants, the white victims, and the black "projects" where the crime took place were not racially moti-

186. People v. Thomas, 561 N.E.2d 57, 75 (Ill. 1990), *cert. denied*, 111 S. Ct. 1092 (1991).

187. State v. Savage, 522 S.W.2d 144, 146 (Mo. Ct. App. 1975); State v. Granberry, 530 S.W.2d 714, 722 (Mo. Ct. App. 1975).

188. Blair v. Armontrout, 916 F.2d 1310, 1347 (8th Cir. 1990) (Heaney, J., concurring and dissenting), *cert. denied*, 112 S. Ct. 89 (1991).

189. *See* Weddington v. State, 545 A.2d 607, 614-15 (Del. 1988); *see* United States *ex rel.* Haynes v. McKendrick, 481 F.2d 152, 161 (2d Cir. 1973) (suggesting harmless error doctrine may not apply to verdicts tainted by racial prejudice); *see also* Miller v. North Carolina, 583 F.2d 701, 707-08 (4th Cir. 1978) (same).

190. *See, e.g.*, Note, *Harmless Constitutional Error: A Reappraisal*, 83 HARV. L. REV. 814, 820-24 (1970).

191. Given the Supreme Court's recent decision in Arizona v. Fulminante, 111 S. Ct. 1246, 1253-57 (1991), that even coerced confessions are subject to harmless error review, it seems unlikely that this position will gain adherents, at least as a matter of federal constitutional law.

192. *See, e.g.*, State v. Rankovich, 765 P.2d 518, 521-23 (Ariz. 1988) (en banc); Herring v. State, 522 So. 2d 745, 748 (Miss. 1988); People v. Rodrigo, 550 N.Y.S.2d 324, 324 (App. Div.), *appeal denied*, 555 N.E.2d 626 (N.Y. 1990); State v. Dien, 554 N.Y.S.2d 581, 581-82 (App. Div. 1990); *cf.* United States v. Doe, 903 F.2d 16, 27-28 (D.C. Cir. 1990), (reversing because evidence of guilt not overwhelming).

193. Russell v. Collins, 944 F.2d 202, 204 n.1 (5th Cir.), *cert. denied*, 112 S. Ct. 30 (1991).

vated, but just "amateur psychologizing."[194] Similarly, it was not misconduct to refer to black prison gangs to rehabilitate a white inmate witness when the prosecutor could have reasonably believed that the asserted attacks were relevant to the witness's fear of retaliation if he testified against the defendant.[195]

In another context, a reference to the defendant's country of birth was "in no way an attempt to arouse racially prejudiced attitudes"; rather, it was arguably relevant to whether the defendant had acted in concert with the codefendants.[196] Most surprising is a Utah court's pronouncement that while "[w]e express no opinion on the soundness of the proposition that casual sexual encounters between people of different races are less likely than those between people of the same race," as the prosecutor attempted to imply, "[t]here is no indication that the remark was made with derogatory intent or to suggest that because defendant was black, he was more likely to have committed the alleged crime."[197] Why the prosecutor's motives should matter at all in these cases is unclear, since the question is not her moral purity, but the trial's fairness. Even if motive should matter, one would think that racist motives encompass more than unsophisticated, unfashionable, and straightforward racial animosity. Indeed, the very fact that courts find some of these arguments plausible suggests a greater danger that jurors will find them persuasive; the plausibility does not alter their racial character.

A more drastic minimizing device is to declare that some remarks have no racial content.[198] Thus, in one case with a black defendant and three separate prosecutorial references to animals (that jurors should not "digress to where the animals

194. Commonwealth v. Johnson, 361 N.E.2d 212, 219 (Mass. 1977).

195. People v. Malone, 762 P.2d 1249, 1265-67 (Cal. 1988) (en banc), *cert. denied*, 490 U.S. 1095 (1989).

196. People v. Longo, 543 N.Y.S.2d 115, 115-16 (App. Div.), *appeal denied*, 551 N.E.2d 115 (1989); *see* State v. Martin, 539 So. 2d 1235, 1240 (La. 1989) (in the prosecution of a defendant of apparently German origin, the prosecutor's reference to "Japanese, Germans and Commie-pinkos" was not considered an attempt to inject race or national origin, but rather an attempt to further a battle example).

197. State v. Thomas, 777 P.2d 445, 448 (Utah 1989).

198. There are enough of these cases that I am persuaded that the approach suggested by Earle, *see* Earle, *supra* note 5, at least without amplification, is unworkable. She argues that explicit references to race and indirect references, as judged by a "reasonable person" standard, should be considered prosecutorial racism. There is so much resistance to acknowledging the racial content of remarks that judges who think of themselves as reasonable people will not necessarily identify racial overtones. At a minimum, an illustrative list is necessary.

are," that they should rise above "animalistic intolerance," that the defendants had treated the victim's girlfriend "like an animal"), the court said that it could not say the remarks were racially prejudicial, given that the defendants were not *referred to* as animals.[199] In a black defendant-white victim case where the prosecutor told the jury that judges, reporters, prosecutors, and police could all do their work " 'til we're black in the face," but "[u]nless you do your job [those efforts will be wasted]," the court described the remark as an attempt to emphasize the gravity of the task and said that "it would take an extremely strained reading to find therein some racial innuendo designed to affect the jury's deliberations."[200] In the case where the prosecutor asked whether it was reasonable to believe the white victim would consent to sex "with . . . that [indicating the African-American defendant]," the court deemed the remark not racial because the evidence had shown disparate life styles, social standing, and dress.[201]

The court deemed "far-fetched" and "merit[ing] no further comment" a complaint that the prosecutor's statement was racially motivated where the defendant was black and the prosecutor said that the streets of the commonwealth were becoming a "jungle."[202] In the case of a black inmate charged with stabbing a white corrections officer, the prosecutor argued: "First of all, credibility . . . . Who are you going to believe in this case? It is absolutely black and white. It is either [the guard's version or the defendant's version]."[203] The reviewing court declared: "There is no indication that the remark contained racial overtones or was directed to anything other than the issue of credibilty."[204] A Missouri prosecutor's statement that ninety percent of all murders are committed by blacks on blacks, followed by an argument that it was time to say that such conduct would no longer be tolerated in "our city,"[205] was said not to

199. State v. Lombard, 471 So. 2d 782, 789-91 (La. Ct. App. 5th Cir. 1985), *aff'd in part and rev'd in part on other grounds*, 486 So. 2d 106 (La. 1986).

200. State v. Brown, 636 S.W.2d 929, 937 (Mo. 1982) (en banc), *cert. denied*, 459 U.S. 1212 (1983).

201. Thomas v. State, 419 So. 2d 634, 635-36 (Fla. 1982).

202. Commonwealth v. Layton, 376 N.E.2d 150, 153 (Mass. App. Ct. 1978).

203. People v. O'Quinn, 537 N.Y.S.2d 626, 626 (App. Div. 1989).

204. *Id.*

205. State v. Noel, 693 S.W.2d 317, 318 (Mo. Ct. App. 1985); *see* State v. Franklin, 526 S.W.2d 86, 90-91 (Mo. Ct. App. 1975) (not an incitement to racial prejudice to argue that victims of 85% of crimes are the people who have to live in black areas or do live in those areas).

inject race into the proceedings, because both the victim and the defendant were black.[206] In another glaring case, the court found no antisemitic overtones in references to a Jewish employee as "Judas," and instead explained the imagery as a reference to the defendant's betrayal of his employer and other "themes of [the] case."[207] Perhaps most amazing is the escalating denial evident in the following explanation of a prosecutor's various comments:

> [The defendant] claims the State's final argument was calculated to inflame the passions of the jury through appeals to racial prejudice. [He] proposes the comment that [the codefendant] was "stuck, by his own stupidity" in a bedroom is an "indirect, but unmistakable reference to the race of the Defendants." He makes the same charge regarding a reference to the persons who simply carry out orders as "these privates," and the group of persons as "the boys". These terms are used as general slang, not a racial comment. [The defendant] professes to see a racial reference to the remark "this one and that one["] . . . . These remarks are not inherently racial comments. Two other phrases are discussed by [the defendant]. First, the prosecutor characterized the testimony of a black defense witness as "shucking and jiving on the stand." The term is clearly of black origin, used to mean to talk in a patently misleading or evasive manner. Its use reminds the jury of the untrustworthy appearance of this witness. Second, the prosecutor said [the defendant] "had to play Superfly" and shoot [the victim] where he lay. Despite the racial content of the term "Superfly," it is not out of bounds to make such an allusion by saying [the defendant] acted like "Superfly," either to characterize his actions by comparison with a known fictional figure, or to imply that [his] behavior is to some extent modeled on the fictional example.[208]

This opinion makes the reader wonder again if the only forbidden arguments are the ridiculously direct arguments from race (for example, "We know he did it because he is black."), the

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206. *Noel*, 693 S.W.2d at 319.

207. State v. Marks, 493 A.2d 596, 606 (N.J. Super. Ct. App. Div. 1985); *see* United States v. Weiss, 914 F.2d 1514, 1525 (2d Cir. 1990) (reference to Jewish Medicaid fraud defendants as "merchants of Franklin Square," characterized as merely a colorful figure of speech and not an attempt to associate defendants with the Shylock character in Shakespeare's *The Merchant of Venice*).

208. Smith v. State, 516 N.E.2d 1055, 1064 (Ind. 1987), *cert. denied*, 488 U.S. 934 (1988).

kind of argument the norm of formal equality suggests would rarely be risked.

Even when racial content is acknowledged—as sometimes it really must be—courts may deprecate its significance. It is not uncommon for a court to characterize the reference to race as isolated or not thematic.[209] Although that characterization is undoubtedly apt in some cases,[210] in others it seems dubious, sometimes because several references have in fact been made. Thus, in one case where the prosecutor twice told the jury to believe the police officer because both he and the accused were black, the court deemed these remarks isolated.[211] On cross-examination the prosecutor had, however, also asked the defendant several questions regarding why another black person would accuse him, but because the questions had not been objected to, the court did not consider them in determining whether or not the summation remarks were isolated.[212] In other cases, one has to doubt whether the lack of repetition is important, given what the prosecutor said. For example, in one case the majority opinion said that the appellant's brief "emphasize[d], out of all proportion, a minor incident" without reporting the nature of the incident.[213] Because there is a dissent in this case, we learn what this "minor incident" was an argument that when Indians drink they can't handle it, and that such drinking often leads to violence—like that at issue in the case. The prosecutor also

209. *See, e.g.*, United States v. Abello-Silva, 948 F.2d 1168, 1181-92 (10th Cir. 1991) (focusing on prosecutor's remark that defendant "secure in the comfort of Colombian corruption . . . laughs at American justice" and defendant is the "biggest fish landed by United States out of that Colombian sea of narcotics," misconstures prosecution in trial of several weeks and closing argument of several hours when statements were factually supported by the evidence) *cert. denied*, 113 S. Ct. 107 (1992); People v. Bramlett, 569 N.E.2d 1139, 1145 (Ill. App. Ct. 1991) (twice argued that officer should be believed because both he and the accused were black, and cross-examined defendant as to why another black person would accuse him); People v. Johnson, 499 N.E.2d 1355, 1368 (Ill. App. Ct. 1986) ("that black man"); People v. Traylor, 487 N.E.2d 1040, 1042 (Ill. App. Ct. 1985) (being a "white policeman in a black neighborhood" explains behavior of officers); Russell v. State, 518 A.2d 1081, 1085-86 (Md. Ct. Spec. App. 1987) (reference to Jamaican drug trafficking in opening statement); People v. Ali, 551 N.Y.S.2d 54, 55 (App. Div.) (testimony of witnesses and one remark by prosecutor on race of police officers and informant), *appeal denied*, 559 N.E.2d 683 (N.Y. 1990); State v. Thomas, 777 P.2d 445, 447 (Utah 1989) (argument that white victim was less likely to consent to sex with defendant because he was black).

210. *See, e.g.*, *Johnson*, 499 N.E.2d at 1368 (single reference to "that black man").

211. *Bramlett*, 569 N.E.2d at 1145.

212. *Id.*; *see Ali*, 551 N.Y.S.2d at 55 (race of the police officer and informer referred to in witnesses' testimony as well as in prosecutor's summation).

213. Soap v. Carter, 632 F.2d 872, 876 (10th Cir. 1980), *cert. denied*, 451 U.S. 939 (1981).

included a diatribe on how people in the Indian community cannot be persuaded that a life without violence is possible, and concluded that the only thing left for the jury to do was to set a standard with its verdict.[214] *That* is a minor incident?[215]

Sometimes a court minimizes not the number, but the invidiousness of the remark.[216] Several cases comment that remarks about sex between black men and white women are not prejudicial, or at least not very prejudicial, because the jurors could see that the defendant was black and the victim white.[217] Thus, in the Alabama case where the prosecutor said that the jury had to believe that the defendant "took it, he got him a white woman," the court noted that everyone would be aware that a black man was on trial for the rape of a white woman and concluded that not every reference to race is bad, but only those remarks that emphasize differences and therefore appeal to prejudice.[218] Also remarkable is a Michigan court's conclusion that a jury would not have been diverted by the "limited number" of references to the defendant and his companion as "colored" "where [these references] were not made in a derogatory manner."[219]

Even more surprising are some of the racial arguments that courts find entirely proper. An argument that the prosecutrix, the daughter of a dentist and a religious person, would not go out with someone not of her race was deemed within the prose-

214. *See id.* at 828 (Seymour, J. dissenting). For a portion of the prosecutor's verbatim remarks, see *supra* note 81 and accompanying text.

215. *See* United States v. Abello-Silva, 948 F.2d 1168, 1181-82 (10th Cir. 1991) (arguments that defendant "secure in the comfort of Colombian corruption . . . laughs at American justice" and that the defendant was the "biggest fish landed by the United States out of that Colombian sea of narcotics").

216. *See, e.g.*, State v. Kamel, 466 N.E.2d 860, 866 (Ohio 1984) (argument that witnesses were unreliable because they were defendant's countrymen, and also because of their foreign birth, was not so prejudicial as to deny them a fair trial); *see also* Commonwealth v. Askins, 465 N.E.2d 1224, 1226 (Mass. App. Ct. 1984) (reference to "foreign accent" of physician witness for defendant, "if intended as a racial slur," did not approach in emphasis or relevance and was not reversible error), *review denied*, 469 N.E.2d 830 (1984).

217. *See, e.g.*, State v. Rhoden, 274 So. 2d 630, 635 (Ala. 1973); STATE V. MAYHUE, 653 S.W.2D. 227, 237 (MO. 1983); STATE V. THOMAS, 777 P.2D 445, 447 (UTAH 1989); *see also* People v. Nichols, 308 N.E.2d 848, 852-53 (Ill. App. Ct. 1974) (prosecutor's reference to black defendant being married to a white woman not so prejudicial where already established in the testimony and wife had appeared as a witness).

218. *Rhoden*, 274 So. 2d at 635.

219. People v. Wilson, 198 N.W.2d 424, 427 (Mich. App. Ct. 1972); *see* Commonwealth v. Morgan, 401 A.2d 1182, 1140 (Pa. Super. Ct. 1979) (prosecutor's argument that white girl would not have patronized a black bar was poorly stated and to a degree improper, but did not constitute misconduct that subverted due process).

cutor's discretion.[220] Similarly, a judge's determination to permit the prosecutor to argue that a motel operator would have remembered seeing the black defendant and his white wife registering because "it don't happen in Transylvania County; it may happen in Charlotte, but it don't happen in Transylvania County" was deemed within *his* discretion.[221] One court explained that the prosecutor's statement, " 'it's hard for me to tell people of the Negro race apart,' " was proper to explain the complaining witness's doubts regarding the identity of one of the defendants.[222] (Apparently the relevance of this argument is that the jury should convict despite the witness's uncertainty!) A prosecutor's repeated references to an "Italian connection," to the defendant as a "Sicilian," and as "the Italian" were deemed permissible because the defendant *was* a Sicilian, had referred to himself as "the Italian," and had consorted with persons who had criminal backgrounds; the court noted that the prosecutor had not alleged that the defendant was a member of the mafia or of organized crime,[223] a rather fine distinction it seems to me.

In a number of cases where the prosecutor made a plea for "equal enforcement" against African-American defendants, the courts have found no error.[224] All of the equal enforcement cases seem naive to me, given the conventions of modern racist speech, but one is particularly egregious. In a case in which the prosecutor urged the jury not to be hard on the defendant just because he was black and the child victim of his sexual offense was white, the reviewing court found no indication of his "lack of sincerity" and no error.[225] Do I need to go on?[226]

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220. State v. Bautista, 514 P.2d 530, 532-33 (Utah 1973).

221. State v. Deas, 212 S.E.2d 693, 694-95 (N.C. 1975).

222. Patterson v. Commonwealth, 555 S.W.2d 607, 610 (Ky. Ct. App. 1977) (alteration added).

223. Haas v. State, 247 S.E.2d 507, 510 (Ga. 1978).

224. Wilder v. State, 401 So. 2d 151, 162-63 (Ala. Crim. App. 1981), *cert. denied*, 454 U.S. 1057 (1981); State v. Stamps, 569 S.W.2d 762, 767-69 (Mo. Ct. App. 1978); State v. Lee, 631 S.W.2d 453, 455-56 (Tenn. Crim. App. 1982); Clark v. State, 692 S.W.2d 203, 205 (Tex. Ct. App. 1985).

225. Dixon v. Commonwealth, 487 S.W.2d 928, 929 (Ky. Ct. App. 1972).

226. *See* Turner v. State, 429 So. 2d 645, 647 (Ala. Crim. App. 1982) (reference to defendant as black was proper for purposes of identification and "to show apprehension on the part of the witness"); State v. Snedecor, 294 So. 2d 207, 209 (La. 1974) (permissible to argue that lounge where shots were fired from a passing car was having racial problems because it refused to serve black people—in light of the "vicious nightriding" nature of the killing, the comment was relevant to show the motive of the black defendant, although there was no apparent link between the defendant and those problems); State v. Parker, 509 P.2d 272, 274 (N.M. Ct. App. 1973) (references to African-Americans as "colored" was

While it is somewhat reassuring to find cases with racial imagery that are reversed, in most such cases an examination of the reasons cited for reversal shows the same narrow view of racism and racist imagery that permeates the cases which are affirmed. Several of these cases note that the prosecutor's purpose clearly was to inflame the jury.[227] The most interesting of these cases is *United States v. Withers*,[228] in which the prosecutor said that "[n]ot one white witness" had been produced in the case to contradict the prosecution's witness.[229] The former United States Attorney who uttered the sentence said that it was "inadvertent" and that he did not "remember it."[230] Many connected with the trial, including the jurors, testified that they could not remember the argument.[231] Also, the district judge denied the motion to vacate sentence at least in part because he found "that the statement complained of was accidentally and unknowingly made by the United States Attorney."[232] Immediately after this statement, however, the United States Attorney said: "Members of the jury, you were qualified in this case. We are not trying this case because these defendants are black."[233] He then went on to refer to a case "where we were prosecuting a white fellow on very similar facts."[234] The circuit court reversed, citing these subsequent statements and concluding that whatever the U.S. Attorney *presently* recalled about the case, "at the time he said it, he clearly had race on his mind and wanted

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not objectionable as a matter of law); People v. Kong, 517 N.Y.S.2d 71, 71-72 (App. Div. 1987) (not improper to refer to defendant and his witnesses as belonging to the same "Jamaican organization" and "Jamaican social club" when defense had elicited that they all belonged to a club called the "Jamaica Social Club").

227. *See, e.g.*, People v. Nightengale, 523 N.E.2d 141, 42 (Ill. App. Ct.) (prosecutor's conduct overall constituted an "open mockery of our judicial system" and was flagrantly done for the purpose of prejudicing the defendant), *appeal denied*, 530 N.E.2d 258 (Ill. 1988); People v. Lurry, 395 N.E.2d 1234, 1238 (Ill. App. Ct. 1979) (attempt to arouse racial fear and animosity); People v. Turner, 367 N.E.2d 1365, 1367 (Ill. App. Ct. 1977) (remarks were "apparent attempts to arouse racial fear and animosity"); Commonwealth v. Graziano, 331 N.E.2d 808, 813 (Mass. 1975)(remarks were calculated to appeal to prejudice); People v. Thomas, 514 N.Y.S.2d 91, 93 (App. Div. 1987) (no other purpose but to inflame); State v. Walker, 411 N.Y.S.2d 377, 380 (App. Div. 1978) (prosecutor's remarks were "designed to engender a collective rage").

228. 602 F.2d 124 (6th Cir. 1979).

229. *Id.* at 125.

230. *Id.*

231. *Id.* at 126.

232. *Id.* at 125.

233. United States v. Withers, 602 F.2d 124, 126 (6th Cir. 1979).

234. *Id.*

the jury to think about what he said."[235]

Why was the trial judge ready to characterize the statement as "inadvertent," given the remarks that immediately followed? What if the prosecutor had not made the follow-up argument? How reliable can determinations of intent be when conscious racism is highly stigmatized?

Just as affirming courts often cite the isolated nature of racial remarks, reversing courts often note that the offensive remarks were not isolated; indeed, often the remarks are merely parts of extended discussions.[236] Moreover, a significant number of the reversals come in cases where the court is unwilling to declare the racial arguments alone to be reversible error, but instead determines that all of the errors taken together warrant reversal.[237]

Finally, many of the reversals occur in cases where the court deems the argument extraordinarily offensive or inflammatory. As one might expect, four of these cases involve sexual threat imagery.[238] In one of these cases, the court said: "One must ask the ugly question: Does a black man's supposed sexual preference [for white women] have anything at all to do with whether he deserves to die for his deeds?"[239] In another case, the court even suggested that automatic reversal is required whenever the racially offensive remark has sexual content.[240] Lest one be too encouraged by these cases, it must be noted that not all courts have taken sexual threat cases so seriously.[241] Indeed, the reversed cases themselves bear witness to the scattered protection the law affords even here: while the Fourth Circuit reversed a conviction on habeas corpus for the egregious argument that "the average white woman abhors anything of [a

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235. *Id.*

236. *See, e.g.*, People v. Lurry, 395 N.E.2d 1234, 1238 (Ill. App. Ct. 1979); People v. Turner, 367 N.E.2d 1365, 1367 (Ill. App. Ct. 1977); State v. Wilson, 404 So. 2d 968, 971 (La. 1981); People v. Thomas, 514 N.Y.S.2d 91, 93 (App. Div. 1987);.

237. *See, e.g.*, State v. Filipov, 576 P.2d 507, 511 (Ariz. Ct. App. 1977); George v. State, 539 So. 2d 21, 21-22 (Fla. Dist. Ct. App. 1989); People v. Nightengale, 523 N.E.2d 136, 142 (Ill. App. Ct.), *appeal denied*, 530 N.E.2d 258 (Ill. 1988); People v. Sales, 502 N.E.2d 1221, 1226 (Ill. App. Ct. 1986); Sparks v. State, 563 S.W.2d 564, 569 (Tenn. Crim. App. 1978).

238. *See* Miller v. North Carolina, 583 F.2d 701, 704 (4th Cir. 1978); Reynolds v. State, 580 So. 2d 254, 256 (Fla. 1991); Dawson v. State, 734 P.2d 221, 223 (Nev. 1987); People v. Richardson, 363 N.E.2d 924, 926 (Ill. App. Ct. 1977).

239. *Dawson*, 734 P.2d at 223.

240. *Richardson*, 363 N.E.2d at 927.

241. *See supra* notes 60-64 and accompanying text.

sexual] nature that had to do with a black man,"[242] the state court had found it harmless error, with one justice asserting that the prosecutor's remarks were justified because they "simply stated a matter of common knowledge."(!)[243]

In one case involving, not sexual threat, but criminal propensity imagery, the Massachusetts court held that a long diatribe about Colombian drug dealers and the difficulty of infiltrating their organization (offered in a case with no evidence that the defendant was involved in a conspiracy) combined with the suggestion that Colombian drug dealers are more dangerous or violent than other drug dealers, would have "tapped any zenophobic feelings that might be latent in the jury" and therefore required reversal.[244] However, in another case with extraordinarily long and varied comments about black people—such as, that they all look alike, that black hairstyles are strange and unattractive, and that young black women are sexually promiscuous[245]—which were unrelated to the charges, two out of three federal judges found that those comments, however "vulgar and revolting" or "nauseating," "did not warrant reversal.[246]

There are only two genuine bright spots in the reversals. In *McFarland v. Smith*,[247] the Second Circuit, reviewing the prosecutor's argument that the credibility of a police officer's testimony was enhanced by the fact that he and the defendant were both black, held that "any reference to [race] by a prosecutor must be justified by a compelling state interest"[248] and that a compelling state interest would only be present if the factual or logical basis for the argument "has a sufficiently high degree of reliabilty to warrant the risks inevitably taken when racial matters are injected into any important decision-making."[249] Not finding this standard met by the highly speculative argument

242. *Miller*, 583 F.2d at 705.

243. *Id.* at 704.

244. Commonwealth v. Gallego, 542 N.E.2d 323, 326 (Mass. App. Ct. 1989).

245. *See* United States *ex rel.* Haynes v. McKendrick, 481 F.2d 152, 154-55 (2d Cir. 1973).

246. *Id.* at 161-62. The court did reverse the defendant's conviction because one of these two judges saw a "blatant" appeal to racial prejudice in the closing sentence: "[W]e cannot take these people out of the community unless you twelve people sitting in judgment on these matters decide these things have got to stop." *Id.* at 162. The third justice "reluctantly dissent[ed]." He opined that his colleagues had been "led to disregard the difference between revolting vulgarity and unconstitutionally prejudicial conduct." *Id.*

247. 611 F.2d 414 (2d Cir. 1979).

248. *Id.* at 417.

249. *Id.* at 419.

about the truthfulness of in-group accusations, the court found constitutional error in a case where the error was not clearly harmless[250] and, consequently, reversed.

Faced with a baseless question to the black defendant about his search for "loose white women," to which a defense objection was sustained, the Delaware Supreme Court noted in *Weddington v. State*[251] that any reference to race must be justified by a compelling state interest.[252] It cited *McFarland*, but went one step further, concluding that "the right to a fair trial that is free of improper racial implications is so basic to the federal Consitution that an infringement upon that right can never be treated as harmless error."[253] Nor may a sustained objection with instructions be treated as a cure, at least not when a mistrial has been requested.[254] The court added a second fallback rationale: the right it was announcing was also guaranteed as a matter of Delaware state constitutional law.[255] Interestingly enough, this pronouncement occurred in a case in which it was unnecessary; the state had conceded error and that the error was not harmless.[256]

One might expect a rash of reversals, and a position analagous to the *McFarland-Weddington* rule to come from the Louisiana courts as a matter of statutory interpretation. The relevant statute provides in pertinant part:

> Upon motion of a defendant, a mistrial shall be ordered when a remark or comment, made within the hearing of the jury by the judge, district attorney, or a court official, during the trial or in argument, refers directly or indirectly to:
>
> (1) Race, religion, color or national origin, if the remark or comment is not material and relevant and might create prejudice against the defendant in the mind of the jury. . . .[257]

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250. *Id.* at 419-20.

251. 545 A.2d 607 (Del. 1988).

252. *Id.* at 614 (citing McFarland v. Smith, 611 F.2d 414, 416-17 (2d Cir. 1979).

253. *Id.* at 614-15.

254. *See id.* at 615.

255. *See id.*

256. *See* Weddington v. State, 545 A.2d 607, 611-12 (Del. 1988). The court found the state's "candor . . . commendable." *Id.* at 611. This may be undue praise, given that the state first argued on appeal that the error was harmless, and then, reversing itself, urged the court to apply an ordinary "balancing test" to the case and find reversible error. *See id.* at 611-12. Is it too cynical to wonder if the state's change of position on the question of whether the error was harmless was not commendable candor at all, but an (ultimately futile) attempt to avoid the holding that racial remarks are not subject to harmless error analysis?

257. LA. CODE CRIM. PROC. ANN. art. 770 (West 1981).

Nevertheless, the pattern of reversals in Louisiana seems no more generous than in states where there is no statute. Instead, the statute seems to have had three odd effects. First, it appears to have increased the appeal rate of racial remark cases.[258] This may be so because the language of the statute gives prospective appellants hope.[259] Second, in the extraordinarily egregious cases, cases that other state courts would likely reverse on due process grounds, the Louisiana courts ignore the Due Process Clause and rely on the statute.[260] In less egregious cases, the courts tend to ignore the language "directly or indirectly" and focus on the qualifying phrase "that might create prejudice against the defendant in the mind of the jury,"[261] with a somewhat cramped interpretation of "might."[262] Finally, their notion of which remarks are "material and relevant" has resulted, on occasion, in very surprising and rather disheartening decisions.[263]

D. Relevant Professional Ethics Constraints

The Model Code of Professional Responsibility has a three tiered structure: canons, which state a general duty, disciplinary rules (DRs), which identify more specific obligations that attorneys must follow, and ethical constraints (ECs), which contain guidelines that attorneys are encouraged to follow. Despite this structure, the Model Code, like its simpler predecessor, the Canons of Professional Ethics, says nothing explicit concerning the use of racial imagery and steroetypes. Two of the Model

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258. State v. Wilson, 404 So. 2d 968 (La. 1981); State v. Jenkins, 340 So. 2d 157 (La. 1976); State v. Thomas, 310 So. 2d 517 (La. 1975); State v. Jackson, 301 So. 2d 598 (La. 1974); State v. Snedecor, 294 So. 2d 207 (La. 1974); State v. Jones, 283 So. 2d 476 (La. 1973); State v. Kaufman, 278 So. 2d 86 (La. 1972); State v. King, 573 So. 2d 604 (La. Ct. App. 2d Cir. 1991); State v. Greene, 542 So. 2d 156 (La. Ct. App. 1st Cir.), *writ denied*, 548 So. 2d 1229 (La. 1989); State v. Lombard, 471 So. 2d 782 (La. Ct. App. 5th Cir. 1985).

259. *See, e.g.*, *King*, 573 So. 2d at 605 (prosecutor referred to victim as "a young black male"); *see also Thomas*, 310 So. 2d at 523 (prosecutor referred to the defendants as "two men, two Negro men, charged with a crime in the parish of St. Landry who were treated with justice"); *Jackson*, 301 So. 2d at 599 (prosecutor said in opening statement that defendant and "three other black males" had entered the apartment).

260. *Wilson*, 404 So. 2d at 968; *Jones*, 283 So. 2d at 476.

261. LA. CODE CRIM. PROC. ANN. art. 770 (West 1981).

262. *See, e.g.*, *Thomas*, 310 So. 2d at 523; *King*, 573 So. 2d at 605-06; *Greene*, 542 So. 2d at 158; *Lombard*, 471 So. 2d at 790; *cf. Kaufman*, 278 So. 2d. at 98 (reversal where remark was also violation of evidence rules).

263. *See, e.g.*, *Snedecor*, 294 So. 2d at 209 (argument of racial animosity as possible motivation for killings was proper despite lack of evidence that defendant entertained such motives).

Code Canons are obviously relevant: Canon 1, which states that a lawyer should maintain the integrity of the legal profession,[264] and Canon 7, which states that "a lawyer should represent a client zealously within the bounds of the law."[265]

Under Canon 1, DR 1-102 (A)(5) prohibits conduct "prejudicial to the administration of justice"[266] and DR 1-102(A)(6) prohibits conduct that reflects adversely on the lawyer's fitness to practice;[267] under Canon 7, DR 7-106(C)(6) requires that a lawyer not engage in "undignified or discourteous conduct which is degrading to a tribunal."[268] Discipline under these provisions (or state analogues) for racial slurs is extremely rare and generally involves a lawyer who has engaged in other reprehensible conduct.[269] I found only one case in which an attorney was disciplined under these provisions for a single racial remark. In that case, a prosecutor with sixteen years experience said to a defense counsel in the hallway outside the courtroom, "I don't believe either one of those chili-eating bastards."[270] Discipline was limited to public censure.[271]

The reader may be incredulous that at least some of the prosecutors' summation remarks discussed earlier in this Article did not result in discipline, but professional discipline for *courtroom* improprieties is virtually unheard of. Professor Gershman, after surveying "literally hundreds of truly egregious instances of prosecutorial misconduct," found that "none . . . resulted in punishment of the prosecutor by his superior or bar

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264. MODEL CODE OF PROFESSIONAL RESPONSIBILITY canon 1 (1983) [hereinafter MODEL CODE].

265. *Id.* canon 7.

266. *Id.* DR 1-102(A)(5).

267. *Id.* DR 1-102(A)(6).

268. *Id.* DR 7-106(C)(6).

269. *See, e.g.*, *In re* Williams, 414 N.W.2d 394 (Minn. 1987) (public reprimand for statement to opposing counsel at deposition: "Don't use your little sheeny Hebrew tricks on me, Rosen" and, for other misconduct, a six month suspension), *appeal denied*, 485 U.S. 950 (1988); *In re* Vincenti, 554 A.2d 470 (N.J. 1989) (attorney given three-month suspension for threatening opposing counsel, engaging in vulgar name calling, failing to cooperate in appearing for the trial call, challenging defendant's investigator to a fight, using threatening and abusive language with judge's clerk, and using racial innunedo on at least one occasion); Mahoning County Bar Ass'n v. Cregan, 584 N.E.2d 656 (Ohio 1992) (one-year suspension from practice subject to possible reinstatement for using demeaning phrases based on race in referring to attorneys, insulting remarks based on race in addressing a counselor, and numerous harassing and threatening phone calls to counseling center).

270. People v. Sharpe, 781 P.2d 659, 660 (Colo. 1989) (en banc).

271. *See id.* The reviewing court noted without comment that the defense motion to bar the prosecutor's further participation in the case was denied. *Id.*

associations."[272] One would hardly expect more vigorous enforcement against defense attorneys, given the countervailing pressure of DR 7-101(A)(1), which requires that a lawyer not "[f]ail to seek the lawful objectives of this client through reasonably available means permitted by law and the Disciplinary Rules."[273] While they may disagree about the underlying causes, commentators agree on the "paucity of professional discipline for abuses in court."[274]

The related remedies of contempt of court and removal from the case are similarly rare for racist behavior or, indeed, any other forensic misconduct.[275] Interestingly enough, despite this general reticence, a Superior Court judge in Washington, D.C. recently removed defense lawyer John T. Harvey from an assault case because he refused to agree that he would remove his kente cloth in the event of a jury trial.[276]

E. Controls on Jury Deliberations

The behavior of jurors is subject to both prospective control through jury instructions and retrospective control through the review of allegations of juror misconduct. Unfortunately, neither of these are very powerful tools, even in the abstract, and neither is well suited to the problem of racial imagery.

As a constitutional matter, jury instructions need only include the presumption of innocence[277] and the requirement of proof beyond a reasonable doubt.[278] Additionally, a judge must avoid instructions that infringe on constitutional rights.[279] Most courts do, however, provide some cautionary instructions in addition to directions concerning the elements of the specific offense with which the defendant is charged. While model instuctions commonly include a general admonition to consider the case "without prejudice, fear, or favor," they do not provide

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272. GERSHMAN, *supra* note 96, § 13.1, at 13-2 n.4.

273. MODEL CODE DR 7-101(A)(1).

274. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 620 (1986); Earle, *supra* note 5, at 1220; *see* GERSHMAN, *supra* note 96, at 13-1; Greg Rushford, *Watching the Watchdog*, LEGAL TIMES, Feb. 5, 1990, at 1.

275. WOLFRAM, *supra* note 274, at 620.

276. *See* Stephen Gillers, *Fighting Words: What Was Once Comical Is Now Costly*, A.B.A. J., Aug. 1992, at 102.

277. Taylor v. Kentucky, 436 U.S. 478, 490 (1978).

278. *In Re* Winship, 397 U.S. 358, 364 (1970).

279. *See, e.g.*, Griffin v. California, 380 U.S. 609, 615 (1965) (forbidding instructions suggesting that silence by the accused may be taken as evidence of his guilt).

for a specific instruction concerning racial prejudice.[280] Of course, an individual judge might include such instructions at her discretion. Instructions, however, would be unlikely to provide much of a shield against racial imagery, even were judges more inclined to give them. The limited research from mock juries indicates that jurors often do not attend to, or are confused by, jury instructions.[281] Moreover, jury instructions assume that the influence of racial imagery on deliberations is conscious; even if instructions inhibit jurors from speaking in explicitly racial terms, they are unlikely to be very effective in erasing previously introduced racial imagery. Even more discouraging is the possibility that judicial references to race may serve to recall and emphasize a racial image presented earlier in the trial; mock jury studies on instructions regarding inadmissible evidence point in this direction.[282]

After-the-fact regulation of juror uses of racial imagery is also unlikely to be significant, first because only convictions could be reached and second, because the general rule that jurors may not impeach their verdicts unless influenced by external forces is widely accepted.[283] Moreover, a third reason dwarfs the first two, for even if more jurisdictions made racial arguments an exception to the general rule prohibiting impeachment of verdicts,[284] one would expect that few such arguments will

280. *See, e.g.*, SEVENTH CIRCUIT JUDICIAL CONFERENCE COMM. ON JURY INSTRUCTIONS, MANUAL ON JURY INSTRUCTIONS IN CRIMINAL CASES § 2.03, at 9 (1965). The language may vary slightly. *See, e.g.*, COMMITTEE ON PATTERN JURY INSTRUCTIONS (CRIMINAL CASES), DISTRICT JUDGES ASS'N OF THE FIFTH CIRCUIT, PATTERN JURY INSTRUCTIONS 5 (1978) (the appropriate language is "without prejudice or sympathy").

281. *See* AMIRAM ELWORK ET AL., MAKING JURY INSTRUCTIONS UNDERSTANDABLE 12-17 (1982); David V. Strawn & Raymond W. Buchanan, *Jury Confusion: A Threat to Justice*, 59 JUDICATURE 478, 480-82 (1976).

282. *See, e.g.*, Stanley Sue et al., *Effects of Inadmissible Evidence on the Decisions of Simulated Jurors: A Moral Dilemna*, 3 J. APPLIED SOC. PSYCHOL. 345 (1973); Sharon Wolf & David A. Montgomery, *Effects of Inadmissible Evidence and Level of Judicial Admonishment to Disregard on the Judgment of Mock Jurors*, 7 J. APPLIED SOC. PSYCHOL. 205 (1977).

283. *See* 3 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE ¶ 606[03], at 606-24 to -28 (1992); Christopher B. Mueller, *Jurors' Impeachment of Their Verdicts and Indictments in Federal Court Under Rule 606(b)*, 57 NEB. L. REV. 920, 924-25 (1978).

284. The Supreme Court has carved out a narrow exception to the rule, holding that when jurors alleged that a bailiff had, in effect, become a witness against the defendant, the defendant's right to be confronted with witnesses against him was violated. Parker v. Gladden, 385 U.S. 363 (1966). One lower federal court has reasoned that the introduction of extraneous racial issues analogously violated the defendant's Sixth Amendment right to an impartial jury. *See* Tobias v. Smith, 468 F. Supp. 1287, 1289, 1291 (W.D.N.Y. 1979).

come to light, and those that come to light by dint of one juror's report are likely to be contested.

III. GETTING SERIOUS

The protections for defendants of color against racial imagery used to enhance the likelihood of their convictions are woefully inadequate. Protection for victims and witnesses against racial degradation on the stand, intended to diminish the defendant's chance of conviction, is virtually nonexistent. Thus, we have a criminal process issue that is neither pro-prosecution nor pro-defense; politically, that should make it easier to agree that change is necessary.[285] If we are concerned enough about the perpetuation of racial stereotyping, if we care enough about the way such stereotyping degrades the person stereotyped and the criminal process, we will do something. Disagreement should be limited to the question of what we should do.

A. Giving a Nod

Making a gesture toward this problem is not nothing. It can be cheap and it can be a first step—even a nod acknowledges existence. The very least we might do, as lawyers, is to incorporate a provision forbidding the use of racial imagery into the legal ethical codes.

Because I have no expertise in professional responsibility issues, I would be the first to admit that others could draft a better canon and disciplinary rules. Still, I can name some essentials. Naturally, I advocate more than a prohibition against prosecutors' arguments that are calculated to inflame the passions or prejudice of the jury, as the ABA Standards for Criminal Justice presently provide.[286] Although I have not examined uses of racial imagery in civil cases in this Article, I see no reason to limit the provision's applicability to criminal proceedings, and certainly it should cover defense attorneys in criminal trials.

Minnesota has a racial prejudice exception to the rule against impeaching verdicts as a matter of statutory interpretation. *See* State v. Callender, 297 N.W.2d 744, 746 (Minn. 1980).

285. Moreover, a 1989 poll found that nearly 80% of all Americans believe that racism permeates the criminal justice system. Fred Strasser, *One Nation Under Siege*, NAT'L L.J., Aug. 7, 1989, § 2, at 1.

286. STANDARDS FOR CRIMINAL JUSTICE, § 3-5.8(c) (ABA 1988). The commentary states that arguments which rely on racial, religious, or ethnic prejudices of the jurors introduce elements of irrelevance and irrationality into the trial.

Moreover, the present ABA prohibition is neither specific nor broad enough.

The provisions ought to refer specifically to: (1) all unnecessary references to race or ethnicity, (2) all insinuations that a person's race or ethnicity make her more or less likely to make a choice in a given way,[287] and (3) all depictions of persons as less worthy of respect than other human beings because of their race or ethnicity. More generally, any other use of language, inflection, or gesture that deliberately calls on or unnecessarily emphasizes supposed differences between racial or ethnic groups should be forbidden.

I would not limit the canon to statements by counsel; of equal importance is the creation of an obligation to prevent the use of racial imagery by one's own witnesses. If this strikes the reader as extraordinary, I would remind her that counsel has an ethical duty under the present code not to put a witness, *even the criminal defendant*, on the stand when she anticipates perjurious testimony.[288] It seems to me that the threat to justice presented by a witness's use of racial imagery is far greater than the threat posed by the lying defendant; juries expect the defendant to lie in her own interest and are apt to treat any defendant's testimony with skepticism. Juries will be far less able to identify and resist racial imagery, for to discount it would often require an examination of their own deepest anxieties. To therefore create an ethical duty for counsel to intervene in anticipated racial perversions of justice does not strike me as asking too much.

Instead of objecting that my proposal asks too much of prosecutors and defense counsel, the reader may object that the practical effect of ethical constraints in this area would be so small that efforts in this direction are pointless. While I hope for more, I think this would be a start. It would be a step forward to acknowledge that racial imagery is a problem common enough to merit its own canon, and not a remnant of a racist past so aberrational that it can be relegated to a generality. An

287. This phrasing is intended to permit argument that the evidence shows racial motive on the part of this particular defendant; it is also intended to permit arguments based not on choice, but on inability. For example, an argument based on the statistically supported proposition that a white witness is more likely to be mistaken about the identity of a black person would be permitted, whereas an argument that she was more likely because of her race to be lying about her belief that the accused was the perpetrator would not.

288. MODEL RULES OF PROFESSIONAL CONDUCT rule 3.3(a)(4) (1990) [hereinafter MODEL RULES].

explicit Code provision would also mean that law students would have to think about racist imagery, at least briefly, in the required professional responsibility course. (It might even become a jumping off point for discussing the manipulation of other group biases.)

Even if there is no enforcement, some people will be swayed by the existence of the provisions and others will be swayed by the moral force behind the provisions, which the revised Code will give them occasion to think about. There will be yet others, mostly defense attorneys, for whom the provision will provide permission to follow preexisting moral qualms about the use of racial imagery, now relieved to learn that the duty of zealous advocacy does not require their employment of racial imagery when strategically useful to the client. The prohibition against the use of perjured testimony certainly functions this way.

Do these subsets together comprise most of the bar? I certainly doubt it, given lawyers' ability to rationalize. But it is *some* of the bar, and that is reason enough to try professional regulation. Moreover, active enforcement in egregious cases might be increased; it could hardly be lessened from the low levels produced by existing general provisions. Finally, it might be administratively enforced in some offices, particularly those prosecutor's offices in which pride is taken in running a clean, professional office. I am thinking here of the position of the Brooklyn District Attorney's Office on the racially discriminatory use of peremptory challenges during the tenure of Elizabeth Holtzmann as D.A.; long before the Supreme Court reversed *Swain v. Alabama*,[289] and after the New York Court of Appeals had affirmed *Swain* as a matter of state constitutional law,[290] these challenges were not permitted in the Brooklyn office. It was well-known among criminal defense attorneys that if a judge reported racial use of the peremptory challenge by an assistant district attorney, that attorney would face reprimand from supervisors. I am also thinking of the reputation of the Manhattan District Attorney's office for relatively "clean" summations during the time I worked for the Criminal Appeals Bureau of the Legal Aid Society of New York. Given the propensity for affirmance under a harmless error rationale, inflammatory summations were unlikely to cost convictions. However, summa-

289. 380 U.S. 202 (1965), *overruled by* Batson v. Kentucky, 426 U.S. 79 (1986).

290. State v. McCray, 57 N.Y.2d 542, 550 (1982).

tions from another New York borough subject to the same First Department Appellate Division review were much dirtier, probably predicated upon the extreme unlikelihood of reversal. With Manhattan summations, the ethic of the office usually imposed sufficient restraint. Sometimes professionalism matters.

B. Giving a Rip

But why should we not do more? What would justify having a rape shield law but not a racial imagery shield law? Reform was warranted in rape prosecutions, because "good woman"/"bad woman" imagery threatened accuracy, because it rendered the victim's experience in court humiliating, because the prospect of such humiliation discouraged complaints, and because awareness that the rape of a "bad woman" would probably go unpunished may have encouraged some rapes.[291] Racial imagery presents obvious analogs to each of these dangers and adds one more: the possibility of convicting the factually innocent. Moreover, there is the additional force of constitutional command: governmental uses of race ordinarily require that the classification be necessary to the accomplishment of a compelling governmental interest. If we know adherence to that standard is sporadic at best, then surely the Fourteenth Amendment bolsters, if it does not command, a prophylactic statute.

Studying rape shield statutes for guidance reveals that they vary both in scope and procedural detail.[292] While all United States jurisidictions now have some provisions as the result of reform efforts[293] and these provisions all share a rejection of the common-law rule of automatic admissibility for proof of unchastity,[294] the unanimity ends there. The most restrictive prohibit the introduction of any sexual conduct, subject to enumerated exceptions.[295] The most lenient give trial judges unfettered discretion to balance probative value against prejudicial effect—simply requiring a judicial determination at an *in camera* pro-

291. *See* Frank Tuerkheimer, *A Reassessment and Redefinition of Rape Shield Laws*, 50 OHIO ST. L.J. 1245, 1250-51 (1989); *see also* Harriet R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 767-68 (1991) (noting the mixed motives behind rape shield statutes).

292. *See* Galvin, *supra* note 291, at 769.

293. *See* Andrew Z. Soshnick, Comment, *The Rape Shield Paradox: Complainant Protection Amidst Oscillating Trends of State Judicial Interpretation*, J. CRIM. L. & CRIMINOLOGY 644, 644-45 (1987).

294. *See* Galvin, *supra* note 291, at 773.

295. *Id.* at 774.

ceeding prior to the introduction of the evidence.[296] Intermediate approaches are exemplified by the federal rules: prior sexual-conduct evidence is generally prohibited, subject to enumerated exceptions *and* a "catch-basin" provision that allows unexcepted sexual-conduct evidence if the evidence is "constitutionally required to be admitted,"[297] or, in another formulation, "relevant and admissible in the interests of justice."[298]

The endeavor to formulate a racial imagery shield law may also be informed by the complaints made about rape shield laws. Second generation criticism of rape shield laws has been multifaceted. This is not surprising, given the variation in first generation reforms.[299] The most restrictive statutes (as well as specific decisions under more lenient statutes) have been criticized for violating the defendant's Sixth Amendment right to cross-examine witnesses against him;[300] the more lenient statutes (as well as unexpected decisions under intermediate and more restrictive statutes) have been criticized for offering too little protection to the witness.[301] In addition, means of circumventing the purposes of the statutes while complying with their terms have been discovered and subsequently critiqued.[302] In one post-rape shield law case, the jury foreman explained the decision to acquit based upon the clothes the complainant was wearing: "She asked for it . . . . [S]he was advertising for sex."[303] The defense has thus shifted from "she can't be raped because we know she is promiscuous" to "she can't be raped because she wears clothes that tell us she is promiscuous." We needed the rape shield laws because there were stereotypes about "good" and "bad" women and a prejudice that "bad" women cannot be raped; it should not be surprising that there is more than one way to tell the jury that the woman before them is "bad."

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296. *Id.* at 774-75.

297. FED. R. EVID. 412(b)(1).

298. N.Y. CRIM. PROC. LAW § 60.42(5) (McKinney 1981).

299. *See, e.g.*, Tuerkheimer, *supra* note 291, at 1247-50.

300. *See, e.g.*, Soshnick, *supra* note 293, at 656-58.

301. *See, e.g.*, Galvin, *supra* note 291, at 873-76.

302. *See, e.g.*, Catherine L. Kello, Note, *Rape Shield Laws: Is It Time for Reinforcement?*, 21 U. MICH. J.L. REF. 317, 344 (1988) (discussing defense attorney who filed civil suit against client's accusor before pending rape charges were resolved, rendering the rape victim subject to civil deposition to which the rape shield protections did not apply).

303. Barbara Fromm, *Sexual Behavior: Mixed Signal Legislation Reveals Need for Further Reform*, 18 FLA. ST. U. L. REV. 579, 579 (1991) (alteration added) (citing FORT LAUDERDALE NEWS-SUN SENTINAL, Oct. 6, 1989, at 1A).

The experience with rape shield laws indicates that drafting a racial imagery statute will be difficult, that there will be glitches in applications, and that experience will show the need for various revisions. I do discern something of a consensus that the intermediate rape shield statutes are better; they specify what can be expected, while they also assume that factual patterns are too complex to anticipate all variations.[304] I therefore start with an analagous structure: racially charged testimony and argument should be presumptively excluded, with some specific exceptions where generalization is possible and a catch-all provision for admitting the evidence on the basis of particularized need.

This leaves three tasks for drafting a workable statute: defining racial imagery, or some like term; setting out some exceptions and the fallback test for nonexcepted racial imagery; and describing the mechanisms by which the prohibitions will be enforced. As for the first task, the reader may have already noted a lack of explicit definition for the subject of this Article. While "I know it when I see it" does not substitute for a definition, sometimes it is better not to attempt a definition until one has seen a little more of "it." Having now seen as much as I can stand, I propose:

> "Racial imagery" is any word, metaphor, argument, comment, action, gesture, or intonation that suggests, either explicitly or through commonly understood allusion, that
>
> (1) a person's race or ethnicity affects his or her standing as a full, capable, and decent human being; or
>
> (2) a person's race or ethnicity in any way affects the credibility of that person's assertions; or
>
> (3) a person's race or ethnicity in any way affects the likelihood that he or she would choose a particular course of conduct whether criminal or noncriminal; or
>
> (4) a person's race or ethnicity in any way affects the appropriate sanctions for a crime committed by or against him or her; or
>
> (5) a person's race or ethnicity sets him or her apart from members of the jury, or makes him or her allied with members of the jury or, more generally, that a person's race or ethnicity allies him or her with other persons of the same race or ethnic group or separates him or her from persons of another race or ethnic group.

304. *See, e.g.*, Soshnick, *supra* note 293, at 690-91.

> Racial imagery will be conclusively presumed from the unnecessary use of a racially descriptive word.
>
> Where a metaphor or simile uses the words "white," "black," "brown," "yellow," or "red"; where any comparisons to animals of any kind are made; or where characters, real or fictional, who are strongly identified with a racial or ethnic group are referred to, racial imagery will be presumed, subject only to rebuttal through proof that the term in question could not have racial connotations with respect to any witness, defendant, attorney, or judge involved in the case.
>
> That a speaker disclaims racial intent, either contemporaneously or at a later date, shall have no bearing upon the determination of whether his or her remarks or actions constitute a use of racial imagery.

I am sure there are racial images that are arguably outside the scope of this definition, but I hope to have captured the most common and the most egregious varieties.

Such a broad definition will require substantial exceptions. Because most of the cases that are presently litigated and reported do not present close calls, I assume any list derived from reported cases would have to be supplemented by talking to defense and prosecuting attorneys. But I start with the assumption that the *McFarland* court was right; use of racial imagery should be[305] subject to the same strict scrutiny standard as other racial classifications. Assuming that discerning the truth in a criminal prosecution is a compelling governmental interest, any use of racial imagery should be *necessary* to the discernment of the truth. At the least, that would seem to require that the probative value of the imagery clearly outweighs the risk of prejudice; I think it also requires that the probative value of the evidence could not be captured in a way that did not implicate race, or that implicated race to a lesser extent. Therefore:

> The use of racial imagery by an attorney, witness, judge, juror, or other court personnel, in the presence of the jury, is prohibited except where
>
> (1) race is part of a description that was given or is being given to identify a particular person *and* the racial component

305. I say "should be" because of the whole morass of the purposeful discrimination standard and the problem of how unconsious racism fits into that standard; but whatever the constitutional command, at least when legislation is being drafted, I think the drafters can stick to "should."

of that description is neither unnecessarily repeated nor phrased in derogatory terms; or

(2) attention is called to the fact that the race of the identifying person is different from that of the person being identified, or argument is made or evidence is adduced that interracial identifications are generally less reliable *and* psychological data does not contradict the correctness of the underlying generalization for the particular racial groups involved *and* differences are described, questioned or argued in terms that are not necessarily inflammatory; or

(3) a racial motive is alleged for the offense *and* there is direct evidence that the defendant entertained a racial motive *and* that motive is described, questioned, or argued in terms that are not unnecessarily inflammatory; or

(4) racial animosity is alleged to have motivated a witness to lie *and* there is a good faith basis[306] for that allegation *and* that motive is described, questioned, or argued in terms that are not unnecessarily inflammatory; or

(5) a racial attitude, including race-based fear, is alleged to have contributed to the defendant's good faith belief that his actions were reasonable *and* his good faith is both relevant and disputed, *and* that attitude is described, questioned or argued in terms that are not unnecessarily inflammatory; or

(6) a racial attitude, including race-based fear or animosity, is alleged to have motivated the actions of a party who is alleged to have provoked or threatened the defendant, where there is a good faith basis[307] for that allegation *and* such provocation or threat is a defense or partial defense to criminal charges, AND the attitude is described, questioned or argued in terms that are not unnecessarily inflammatory; or

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306. The statute requires "direct evidence" that the defendant entertained a racial motive, but only "a good faith basis" for allegations that racial animosity motivated a witness to lie. The difference in standard is partly due to constitutional constraints imposed by the Confrontation Clause of the United States Constitution, which applies only to defendants. It also reflects my concern that there is enough bias against people of color that a more lenient standard is needed to permit inquiry, which in turn may often reveal bias. In two of the cases where African-American defense attorneys have been criticized for cross-examinations that inquired about racial motivations, some evidence of racial bias was in fact adduced. To lawyer Alton Maddox's question, "When you saw two black men walking in a civilized manner down Dyer Avenue, it ran across your mind that you were about to be raped?," witness Marla Hanson answered, "Yes, that thought ran through my mind." E.R. Shipp, *Defense Lawyers' Tactics: Unfair or Just Aggressive?*, N.Y. TIMES, Apr. 21, 1987, at B1, B4. In the Central Park jogger case, attorney Colin Moore asked witness Patricia Malone, "Was it their dark complexions that terrified you?" She responded, "Yes, ... I feared they would knock out Jerry and rape me." Ronald Sullivan, *Judge Rejects Lawyer's Plea in Jogger Trial*, N.Y. TIMES, Oct. 27, 1990, § 1, at 27.

307. *See supra* note 306 and accompanying text.

(7) the racial imagery is expressed through the personal appearance of an attorney, witness, judge or juror *and* that appearance is his or her ordinary appearance *and* that appearance does not express hatred for, contempt of, or intimidation of another racial or ethnic group;[308] or

(8) the use of the racial imagery is in some other way necessary to the accurate determination of the truth of the charges against the defendant(s).

This list of exceptions is not to be read as requiring the admission of evidence that a court deems more prejudicial than probative under the particular circumstances of the case.

How would such provisions be enforced? When the application of the definition or the exception is subject to dispute, an *in camera* proceeding would be necessary before the racial imagery is in any way posed to the jury. The duty to seek such a hearing would have to rest on the party profferring the question, comment, or argument. When that duty is violated, and the court determines that impermissible racial imagery has been presented to the jury, the opposing side should have the choice of a mistrial or corrective instructions.

When the trial court errs in its determination that the imagery is not prohibited or defense counsel fails to object to that imagery, and the defendant is convicted, a second level of questions is raised, one not encountered with rape shield statutes. I am convinced that something very close to an automatic reversal standard is necessary.[309] The urge to affirm convictions of "obviously" guilty defendants is so strong, the pattern of finding a reason to affirm in these cases so thoroughly entrenched,

308. Removing an attorney for his refusal to agree to remove his kente cloth in the event of a jury trial strikes me as outrageous. *See supra* note 276 and accompanying text. Undoubtedly some forms of appearance (particularly those put on for trial) may be inflammatory. For example, I would not expect the court to permit an attorney to wear a white hood. But appearance that is "unusual" only for its identification with a culture other than a white western culture seems completely unobjectionable.

309. The one exception that strikes me as worth considering is a single, descriptive, neutral, but unnecessary reference to race in a context that is not inflammatory. Describing the victim as "a young black male" would fall into that category. Describing the victim as "a nice white lady" would not; because "white" is joined with "nice" in a way that plays on black-as-evil imagery, it is not neutral. Asking, "Can you imagine her state of mind when she woke up at 6 o'clock that morning, staring into the muzzle of a gun held by this black man?," Blair v. Armontrout, 916 F.2d 1310, 1347 (8th Cir. 1990), *cert. denied*, 112 S. Ct. 89 (1991), would not fall within the exception because it is inflammatory. *Cf.* DeBrota, *supra* note 5, at 383-81 (advocating an exception to the harmless error rule in all cases where the prosecutor has appealed to racial prejudice of jury, but discussing only egregious cases).

that I know of no other way to assure each defendant that her trial was not unnecessarily tainted by racial prejudice. This position assumes that "taint" occurs not only when the result is altered, but also when race is injected into (or, perhaps more commonly, underlined during) the process.

Undoubtedly this statute would affect a lot of trials. Undoubtedly lawyers would become more cautious in preparing their witnesses and more inhibited in their summations. The nation would not hear that Rodney King "groaned like a wounded animal," and in the vast number of almost anonymous cases, the courtroom participants would be spared the ten-thousandth dose of poison. One small corner of our nation's discourse would be both more illuminating and closer to the truth.

C. Giving When It Hurts

Why is darkness a thing of dread? Maybe our ancestors feared the dark for the predators they could not see. But darkness is also the womb, the bed, the shade; why don't those "realities" find metaphors in our speech? Can white people see those realities? If they could see them, how could white prosecutors say all the things they have said?

A racial imagery shield law would not be enough. It is hard to imagine what could be enough to root out racial imagery from jury deliberations. In the end, the shield law might prevent the reinforcement of biases, the focusing of blurred images, the reconfiguration of old stereotypes, but it could never erase the reels and reels of racial films viewed over a lifetime. Nothing can do that.

It is hard for white people to admit we are not the standard, the neutral, the baseline decision-maker against which others should be compared. It is hard for everyone who wants to believe in ultimate fairness to acknowledge that the typical decision maker is not the ideal decision maker, that racial prejudice is not an aberration, that it taints everyone it touches, and that it touches everyone. It is one thing to say that a lawyer may not strike a juror because of his or her race; we admit only that a minority race juror in a case with a minority defendant is not presumptively *less* competent, *less* fair than the white juror. What is hard for white people to admit is that the minority race juror is *more* likely to be competent, *more* likely to be fair.[310]

310. *See generally* Johnson, *Black Innocence*, *supra* note 32.

Of course, people of color have seen the same films, heard the same metaphors, lived with the same torrent of images of white as pure, good, light, clean, true, safe, normal, right—and the contrasting flood of negative images of blackness, brownness, yellowness, redness, "nonwhiteness." But at least most of them have other images too. At least there is also the lived warmth of color, the contrary images, and the lived pain of the distorting images.

This is not a matter of speculation. If the entire body of relevant data is surveyed, the inference that race influences many white jurors' determinations of guilt is unavoidable. As I have argued at great length elsewhere, taking together the observations and statistics from criminal trials, the results of mock jury experiments, and conclusions from general research on racial prejudice, it is clear that justice would be advanced by greater representation of people of color on juries.[311] A survey of the breadth and frequency of the criminal trial uses of racial imagery provides one more reason for mandatory inclusion of minority jurors; we cannot eradicate the imagery, but we can give voice to richer perspectives on that imagery.

It is humbling to think of what we *could* do were we willing, but it should not be paralyzing. Even if we do not yet have a consensus to do all that we might to ameliorate the effects of racial imagery on criminal trials, we can do something. An ethical provision forbidding the use of racial imagery would be better than nothing and a race shield statute would be better than an ethical provision.

IV. CONCLUSION

> Black people are the magical faces at the bottom of society's well. Even the poorest whites, those who must live their lives only a few levels above, gain their self-esteem by gazing down on us. Surely, they must know that their deliverance depends on letting down their ropes. Only by working together is escape possible. Over time, many reach out, but most simply watch, mesmerized into maintaining their unspoken commitment to keeping us where we are, at whatever cost to them or to us.[312]

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311. *Id.*

312. BELL, *supra* note 7, at preface page. I can acknowledge Professor Bell's metaphor, but I can't begin to acknowledge the influence of his work on my thinking. I am moved, enlightened, saddened, inspired, and grateful.

We do not choose our dreams, either the endless nightmares or the fleeting images we see as we turn around. Those dreams come unbidden, populated by characters we did not draw. We do choose what to do with those dreams, and in choosing, shape the dreams of our children. We can pretend we do not remember those dream characters, do not recognize them in our waking hours, but we do. The face we see at the bottom of the well is the face we fling to the bottom of the well, is a face that falls to the bottom of the well, is the face we see at the bottom of the well, is the face . . . . Maybe racism is a circle with a tread so deep that we will circle around forever, whatever direction we try to step, however many of us reach out . . . . But one step, one choice at a time. The first one: What color is the face at the bottom of the well? Do we lie politely, cautiously, with the best and worst of motives? Or do we tell the truth, in the hope of changing it?